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JUNE 14, 2018

EMPLOYMENT LAW UPDATE: SELECTED CASES OF INTEREST TO CITIES

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This paper summarizes recent developments in employment law relevant to cities including developments and trends at the Equal Employment Opportunity Commission; cases and decisions involving sex discrimination and sexual harassment; cases and decisions involving public employees' First Amendment rights; and cases and decisions on accommodations of disabilities. The paper concludes with a discussion of the #metoo movement's effect on workplace harassment law, and provides basic guidance on preventing and responding to workplace complaints.

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I. THE LATEST AT THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

A. Commission Composition

The Acting Chair of the EEOC is Victoria Lipnic, who was appointed by President Trump and has been serving since last July. Obama-appointed Commissioners Chai Feldblum and Charlotte Burrows' terms expire July 1, 2018 and July 1, 2019, respectively. The remaining two positions on the Commission are vacant. President Trump nominated Janet Dhillon and Daniel Gade to fill these positions in October 2017, but the nominations have not yet been confirmed by the Senate. The General Counsel position is also vacant; President Trump nominated Sharon Gustafson for the position in March 2018, and she is also awaiting confirmation.

B. Strategic Plan

On February 12, 2018, the EEOC released its Strategic Plan for 2018-2022, which sets out the following strategic objectives:

1. Combating and preventing employment discrimination through the strategic application of EEOC's law enforcement authorities.

The EEOC's goals for this objective are for (a) discriminatory practices to be stopped and remedied, and for victims of discrimination to receive meaningful relief, and (b) enforcement to be exercised fairly, efficiently, and based on the circumstances of each charge or complaint. The EEOC states that its strategies to achieve these goals include using administrative and litigation mechanisms to identify and attack discriminatory policies and practices, seeking remedies to end discriminatory practices and deter future discrimination, seeking remedies that provide meaningful relief to individual victims of discrimination, and rigorously and consistently implementing the charge and case management systems.

2. Prevent employment discrimination and promote inclusive workplaces through education and outreach.

The EEOC's goals for this objective are for (1) members of the public to understand the employment discrimination laws and know their rights and responsibilities under those laws, and (2) for employers, unions, and employment agencies to prevent discrimination, effectively address EEO issues, and support more inclusive workplaces. The EEOC states that its strategies to achieve these goals include broadening use of technology to expand its reach to diverse populations, targeting outreach to vulnerable workers and underserved communities, promoting practices employers can adopt to prevent workplace discrimination, targeting outreach to small and new employers, and using modern technology and media to expand its reach to employers and other covered entities.

3. Achieving organizational excellence.

The EEOC's goals for this objective are for (1) the EEOC to have a culture of excellence, respect, and accountability, and (2) for the EEOC's resources to align with priorities to strengthen outreach,

education, enforcement, and service to the public. The EEOC's strategies to achieve these goals include developing and supporting innovation and collaboration to foster employee engagement and morale, fostering constructive employee and labor management relations, modeling the workplace practices it promotes, and expanding the use of data and technology to support, evaluate, and improve the agency's programs and processes.

C. Trends

Retaliation is the fastest growing claim category—the percentage of EEOC charges alleging retaliation more than doubled in ten years from 23% in 1997 to an all-time high of 49% in 2017. The percentage of EEOC charges alleging disability discrimination is also growing. In 2017, the EEOC saw all-time highs both nationally (32%) and in Texas (30%).

Although the percentage of EEOC charges claiming sexual harassment and discrimination has been decreasing, including from 2016 to 2017, the #MeToo movement is expected to cause an increase in 2018. The 2017 EEOC statistics did not capture the influence of the #MeToo movement since it began with Alyssa Milano's tweet in October 2017 after the start of the 2018 fiscal year.

II. SELECTED CASES OF INTEREST TO CITIES

A. Sex Discrimination/Sexual Harassment Cases

1. *Davenport v. Edward D. Jones & Co.*, No. 17-30388, 2018 WL 2251695 (5th Cir. May 16, 2018).

The plaintiff-employee, Davenport, alleged a manager conditioned the receipt of large bonuses on Davenport's submission to his repeated requests that she date a wealthy client. The manager also told Davenport that she should send the client some "nudie pictures" to pique the client's interest. After becoming distraught by the comments, Davenport resigned and sued alleging claims of quid pro quo sexual harassment based on constructive discharge for her refusal to date the client, quid quo pro sexual harassment based on the receipt of bonuses in exchange for engaging with the client, hostile work environment, sex discrimination, defamation, and false light invasion of privacy. The district court granted the employer's summary judgment motion on all of these claims.

On appeal, at issue was only the quid pro quo constructive discharge claim, the quid pro quo bonus-based claim, and the invasion of privacy claim, as Davenport did not timely appeal the other claims. The Fifth Circuit affirmed.

Regarding the quid pro quo constructive discharge claim, the court held Davenport did not exhaust her administrative remedies because she did not allege in her charge that she left employment or her reasons for leaving. Regarding the quid pro quo claim based on the bonuses, the court disagreed with the district court's statement that "Fifth Circuit precedent implies that sexual advances related to the alleged tangible employment action must relate to advances with the supervisor," not third parties. The Fifth Circuit concluded that because the manager made the request, the manager engaged in the sexual harassment and was the harasser, not the client, and a request to engage with a third party can be

sexual harassment. The court also rejected the employer's argument that because the manager only requested for Davenport to date the client, there was no sexual advance and thus no sexual harassment. The court stated the request to date was conduct of a sexual nature, especially in light of the nude picture comment. Regardless, the court held that Davenport's quid pro quo claim could not succeed because she did not raise sufficient evidence of adverse employment action—she presented no "significantly probative" evidence that a bonus was available, that she was eligible for it, and that she was denied the bonus for refusing to date the client.

On the invasion of privacy claim, the court concluded that the nude picture comment did not result in an unreasonable invasion of privacy because it was intended by the manager and taken by Davenport as a joke. The dissent argued that it was a question for the jury whether Davenport would have received a bonus but for refusing to date the client, pointing to the manager's repeated statements that Davenport would receive bonuses in exchange for dating the client and the fact that Davenport received a $400 bonus the previous year.

2. ***Alamo Heights Indep. Sch. Dist. v. Clark***, No. 16–0244, 2018 WL 1692367 (Tex. Apr. 6, 2018)

Alamo Heights examines the line between non-discriminatory bullying and cognizable sexual harassment. Clark sued the school district for sexual harassment and retaliation, alleging she had been harassed by another female coach, Monterrubio, and was fired in retaliation for reporting the harassment. In the suit, Clark alleged Monterrubio harassed and bullied her over four dozen times, some of which were sexual in nature, including commenting repeatedly about Clark's breasts and buttocks; upon receiving a candle Clark brought to a coaches' holiday gift exchange, stating she was going to make love next to it; making jokes about the smell of Clark's private parts; suggesting Clark and a male coach should "hook up," and grabbing her behind once during a group photo. Clark stated she was offended by Monterrubio speaking frequently about her own sex life to all the coaches, including Clark; displaying a photo of her boyfriend's genitals; sending vulgar emails to various employees, including Clark; and her inappropriate behavior and "extremely dirty dancing" at a faculty holiday party.

After discovery, the school district filed a plea to the jurisdiction on grounds that its governmental immunity was not waived because Clark did not present any evidence of a statutory violation under the Texas Commission on Human Rights Act (TCHRA). The school district presented evidence of Clark's poor job performance, noncompliance with a growth plan, and policy violations as the nondiscriminatory reasons for her termination. The district court and the San Antonio Court of Appeals both denied the school district's plea to the jurisdiction because they found that Clark raised fact issues on the prima facie elements of both her claims.

The Texas Supreme Court considered two issues on appeal (1) whether the evidence raised an inference of gender-motivated discrimination and (2) as a matter of first impression, whether a plaintiff must produce evidence to support a retaliation claim when no presumption of unlawful retaliation exists under the *McDonnell Douglas* burden-shifting framework.

First, the Court held that Clark did not raise a fact issue that she was harassed "because of" her gender

because although the conduct was "rude, crass, and hostile" and "so offensive that it is easy to understand that a sense of decency initially inclines one to want to grant relief," Clark did not present evidence that Monterrubio was motivated by sexual desire, was generally hostile to females, or was comparatively discriminatory to females over males. Instead, Monterrubio was equally hostile and inappropriate toward her male and female coworkers. The Court further stated that comments about gender-specific anatomy do not alone raise an inference of gender-based harassment.

Second, the Court held that the court of appeals erroneously limited its jurisdictional inquiry on Clark's retaliation claim to the prima facie step of the *McDonnell Douglas* framework. The Court explained that instead, each step must be considered such that "when jurisdictional evidence negates the prima facie case, or, as in this case, rebuts the presumption it affords, some evidence raising a fact issue on retaliatory intent is required to survive a jurisdictional plea." Following this standard for Clark's claim she was fired in retaliation for her EEOC charge the Court held she did not present a fact issue that she would not have been terminated but for the filing of the EEOC charge. Thus, Clark's retaliation claim failed as well, and the Court reversed the Court of Appeals and dismissed Clark's case.

3. ***Wittmer v. Phillips 66 Co.***, No. H–17–2188, 2018 WL 1626366 (S.D. Tex. Apr. 4, 2018)

In *Wittmer*, the Southern District of Texas granted summary judgment for the employer in a transgender discrimination case. In this case, a transgender engineer alleged an offer of employment was rescinded because the employer learned she was transgender. The employer asserted it rescinded the offer not because of discrimination, but due to misrepresentations she made during her interview about her employment history.

Lacking Fifth Circuit precedent and following *Zarda v. Altitude Express* (discussed below) and *EEOC v. R.G.* (also discussed below), the court assumed that transgender people are a protected class under Title VII. The court nevertheless granted summary judgment to the employer because the employee failed to show prima-facie evidence of discrimination and, even if she had, the employer presented unrebutted evidence of a legitimate, non-discriminatory reason for rescinding its offer. Specifically, the court held that the plaintiff did not identify or present evidence that she was treated less favorably than non-transgender applications or than applicants who were found to have misrepresented their employment history. The plaintiff appealed to the Fifth Circuit on April 23, 2018.

4. ***Zarda v. Altitude Express, Inc.***, 883 F.3d 100 (2nd Cir. Feb. 26, 2018)

In *Zarda*, an en banc Second Circuit on rehearing joined the Seventh Circuit in holding that sexual-orientation discrimination is protected under Title VII. Plaintiff Zarda, a skydiving instructor, commented to a female client with whom he was about to skydive in tandem, that he was gay and "had an ex-husband to prove it." Zarda stated this disclosure was to assuage any discomfort the client might have felt being strapped to an unfamiliar man. The client told her boyfriend about the comment, who then reported it to Zarda's boss, who terminated Zarda shortly thereafter.

Zarda sued the employer claiming unlawful sex stereotyping and sexual orientation discrimination. The district court granted summary judgment for the employer, stating Zarda failed to establish a prima facie

case of discrimination under Title VII. The district court followed Second Circuit precedent from 2000 holding that sexual orientation discrimination claims are not cognizable under Title VII. Zarda appealed, and a panel of the Second Circuit in 2017 affirmed the district court's decision, but Zarda sought rehearing en banc, which the court granted.

In holding sexual orientation discrimination is cognizable under Title VII, the court explained that because sexual-orientation discrimination is motivated in part by sex, sexual-orientation discrimination is a subset of sex discrimination. The court further explained that sexual orientation discrimination is prohibited by Title VII's prohibition on discrimination "because of sex" because "sex is necessarily a factor in sexual orientation;" such a reading is reinforced by the fact that sex stereotyping is prohibited, which is based on presumptions about how members of a certain sex should behave; and is logical in light of the fact that associational discrimination is prohibited, which is based on an employer's disapproval of certain romantic relations.

Of note is that on rehearing, the EEOC filed an amicus brief for the skydiving instructor, consistent with its own 2015 precedent that Title VII prohibits sexual orientation discrimination, while the Department of Justice filed an amicus brief for the employer, arguing the opposite, in the briefing in the case. Although the Supreme Court denied a petition for certiorari in a sexual-orientation case out of the Eleventh Circuit last year that held sexual orientation discrimination is not prohibited by Title VII, the growing circuit split (last year, the Seventh Circuit held Title VII prohibits sexual orientation discrimination) may prompt the Court to grant such a petition in the near future.

5. ***EEOC v. R.G. & G.R. Harris Funeral Homes***, 884 F.3d 560 (6th Cir. Mar. 7, 2018)

After *Zarda*, the Sixth Circuit recognized transgender discrimination under Title VII in *EEOC v. R.G.* In this case, a funeral-home employee was fired after telling his employer that he intended to become female. Because "transgender or transitioning status constitutes an inherently gender non-conforming trait," and gender non-conformity is a recognized basis for discrimination under Title VII, the court held that transgender discrimination is a Title VII cause of action.

The court also held the ministerial exception did not apply to the employee's Title VII claim because the funeral home was not a religious institution. While the funeral home included honor to God in its mission statement, the funeral home did not establish or advance Christian values, was not affiliated with a church, its articles of incorporation did not mention a religious purpose, its employees were not required to hold particular religious views, and it employed and served individuals of all religions.

6. ***Rice v. FCA USA, LLC***, No. E064958, 2018 WL 345731 (Cal. Ct. App. Jan. 10, 2018)

In *Rice*, a California appeals court applied California's Fair Employment and Housing Act (FEHA) to a sexual harassment claim and held that an employer's response to the alleged sexual harassment was inadequate to support the employer's motion for summary judgment. The case involved an operations manager at a Chrysler plant. Although Chrysler conducted an investigation, the investigation was not timely because it took five months to complete. The investigation also was not thorough because it did not include interviews with key personnel—including the plaintiff (although the investigator attempted

to contact her). Moreover, the investigation included no written report, and Chrysler took no temporary actions to address the problem. The court reasoned that "[p]olicies to prohibit harassment and investigate claims are mere lip service if the employer does not act on those policies by conducting a reasonably thorough investigation to root out harassment." Because there was evidence that Chrysler did not conduct a reasonably thorough investigation, the court denied Chrysler's motion for summary judgment.

B. Retaliation Cases

1. *Fisher v. Lufkin Industries, Inc.*, 847 F.3d 752 (5th Cir. 2017).

In *Fisher*, the Fifth Circuit further developed its doctrine of "cat's paw" retaliation in addressing a question of proximate causation. "Cat's paw" retaliation occurs when the ultimate decision-maker holds no retaliatory motive, but the retaliatory action was proximately caused by a person with retaliatory motive. Fisher, an African American machinist at a machinery-production plant complained to the company's HR department that his boss called him "boy." About a month after this complaint, other employees, motivated by Fisher's complaint, conducted a sting operation to expose the fact that he sold DVDs at work containing pornographic material. After Fisher resisted investigation into his sale of these DVDs—including leaving work to avoid a search of his car, he was fired.

The district court found that while there was a retaliatory motive, Fisher's resistance to the investigation of his sale of pornographic DVDs was an independent justification for his termination, so there was no causal link between the protected activity and adverse action. The Fifth Circuit held that this finding was clear error because the retaliatory motive of the employees who conducted the sting operation was a proximate cause of Fisher's termination. This proximate cause was not superseded by the actions of the employee assigned to investigate the DVDs or the manager who fired Fisher, neither of whom had retaliatory motives for their actions.

2. *Metro. Transit Auth. v. Douglas*, No. 14–17–00176–CV, 2018 WL 1057629 (Tex. App.—Houston [14th Dist.] Feb. 27, 2018, no pet.)

In *Douglas*, the Houston Court of Appeals considered whether an employee exhausted her administrative remedies for a retaliation claim. Douglas, a transit authority police officer, was not selected for promotion, and sued alleging sex discrimination and retaliation for her filing a charge of discrimination. The employer filed a plea to the jurisdiction alleging Douglas failed to exhaust her administrative remedies for the retaliation claim because her initial administrative charge only alleged discrimination. The district court denied the employer's plea.

On interlocutory appeal, the court first held the employer's appeal was not moot though Douglas filed a second administrative charge on retaliation before the appeal was filed, because there was still a live controversy about timeliness and whether there were adverse employment actions. The court then held that the employer's downgrade of Douglas's performance evaluation and removal of "distinguished" status alleged as retaliatory acts constituted adverse employment action sufficient to waive immunity.

Regarding whether Douglas exhausted her administrative remedies, the court first held that under

Gupta v. E. Tex. State Univ., 654 F.2d 411 (5th Cir. 1981), administrative remedies are exhausted for a retaliation claim that grows out of an earlier, timely administrative charge, and that the U.S. Supreme Court's holding in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) that plaintiffs cannot use a continuing violation theory to assert claims for acts outside the 300-day limit did not change this rule. Finally, the court held the retaliation claim grew out of the discrimination charge because Douglas alleged she was retaliated against for filing the discrimination charge. Therefore, the court of appeals affirmed the trial court's denial of the employer's jurisdictional plea.

3. ***Vanderhurst v. Statoil Gulf Services***, No. 01–16–00461–CV, 2018 WL 541912 (Tex. App.—Houston [1st Dist.] Jan. 25, 2018, pet. filed).

Vanderhurst was a TCHRA summary-judgment case that addressed the causation element of retaliation, whether the alleged sexual harassment was severe and pervasive, and whether the work environment was objectively intolerable. In this case, Vanderhurst, a senior male employee, was assigned to mentor Irvine, a younger employee, and the two had an affair. When Vanderhurst ended the affair, Irvine threatened to harm him and his wife and to accuse him of sexual misconduct. Vanderhurst reported the affair and her actions to HR, and the firm responded by separating the two employees by moving their desks apart and placing them on separate teams. While Irvine never threatened Vanderhurst again, he alleged that she would pass by his desk many times throughout the day and stare at him during work meetings.

Vanderhurst then learned that he had been passed over for a promotion, and was removed as team leader of a project. He later resigned and sued the employer for retaliation, constructive discharge, and hostile work environment. The trial court granted summary judgment for the employer, and Vanderhurst appealed.

On appeal, Vanderhurst claimed he raised a fact issue that the employer's actions were retaliatory, but the court disagreed because the employer presented legitimate reasons for its actions, and Vanderhurst was unable to produce evidence besides the close temporal proximity of the actions to his HR report to show pretext. Vanderhurst also claimed that he raised a fact issue that he was subjected to a hostile work environment. The court disagreed because the harassment did not affect a "term, condition, or privilege of employment," and, considering the totality of the circumstances, Vanderhurst did not produce evidence to show that his work environment was "objectively offensive."

Although the court did not need to reach Vanderhurst's claim of constructive discharge because this claim requires "a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment," the court nevertheless noted that he waited to resign until the day his employer deposited a long-term incentive bonus in his bank account. The court therefore affirmed the summary judgment of the trial court.

4. ***Lamar Univ. v. Jenkins***, No. 09–17–00213–CV, 2018 WL 358960 (Tex. App.—Beaumont Jan. 11, 2018, no pet.) (mem. op.).

In *Jenkins*, the Beaumont Court of Appeals considered whether a professor who spoke in opposition to using the GRE in graduate admissions as racist constitutes a protected activity under the

TCHRA or a violation of constitutional rights. Jenkins sued alleging retaliation for this speech due to the denial of his promotion to full professor with tenure, for declaratory judgment that the university violated his rights under the TCHRA, and for claims for violation of his rights to due course of law and free speech under the Texas Constitution. The university filed a plea to the jurisdiction, which the district court denied.

The court of appeals reversed and rendered judgment dismissing Jenkins's case. Regarding the TCHRA claim based on the GRE as racist, which he argued affected university employment since use of the GRE would exclude students from the opportunity to become paid graduate students, the court held that "a speculative opportunity for employment of a prospective graduate student does not demonstrate that the University engaged in an unlawful employment practice." The court also held he did not plead a valid declaratory judgment claim for a violation of his rights under the TCHRA since there was no unlawful employment practice, a valid due course of law claim because he had no property interest in his job, or a valid free speech claim because he spoke pursuant to his official duties as Chair of the Department of Educational Leadership, not in his capacity as a private citizen.

5. *Texas State Univ. v. Quinn*, No. 03–16–00548–CV, 2017 WL 5985500 (Tex. App.—Austin Nov. 29, 2017, no pet.) (mem. op.).

In *Quinn*, the Austin Court of Appeals held that a professor made a prima-facie case for retaliation. The professor complained of disability discrimination to her supervisor and subsequently was not promoted to a permanent position she applied for and her contract was not renewed. In addition to showing these actions occurred after her protected activity, the professor produced evidence that her supervisor and the dean of the nursing school decided not to hire her for the permanent position no matter how well she would score in an interview. Of note, the court rejected the university's argument that failure to renew a term contract cannot be used as adverse action to support a discrimination claim.

6. *Metro. Transit Auth. v. Ridley*, 540 S.W.3d 91 (Tex. App.—Houston [1st Dist.], no pet.) (Sept. 7, 2017).

In *Ridley*, a transportation-authority employee brought state-law claims of discrimination on the basis of race and sex and retaliation by constructive discharge. Because the employee failed to show a causal connection between her protected activity and the alleged retaliation, and because she provided insufficient evidence of disparate treatment, the Houston Court of Appeals granted the transportation authority's plea to the jurisdiction.

On the retaliation claim, the court noted that when an employer's actions are "consistent with, and a continuation of the actions taken before [a] complaint," the court will tend to make a finding of no retaliation, even if there is some evidence of "escalating" or "worse" actions by the employer. In this light, the court pointed out that both before and after the employee's protected activity the transportation authority placed her on a performance program, expressed concern about her communication skills, and circumvented her supervisory role by not including her in communications with her subordinates. The court also did not find persuasive evidence that the employee's performance reviews worsened after the hiring of a new executive vice president, noting that the alleged harsher

reviews could be attributed to her increased job responsibilities.

On the discrimination claim, the employee alleged she was passed over for the position of Interim Director of Transportation Services. Although the employee argued she was placed on a performance plan to disqualify her from the position, the court dismissed this argument because the employee failed to provide evidence overcoming the presumption that she was placed on the plan for her own professional development. The employee also provided insufficient evidence to establish that the person who received the position was a similarly situated individual because her complaint excluded enough facts to create the necessary comparison. Thus, the court held the employee failed to show both that she was qualified for the position and that she was treated less favorably than a similarly situated individual not part of her protected class.

C. Public Employee First Amendment Cases

1. *Malin v. Orleans Parish Commc'ns Dist.*, 718 F. App'x 264 (5th Cir. Feb. 15, 2018)

In *Malin*, the deputy director of a communications district was terminated after accidentally replying all with an email harshly criticizing the fiscal responsibility of a departing board member. The deputy director claimed retaliation against protected speech, but the Fifth Circuit affirmed the summary judgment of the district court dismissing this claim. Although the court stated the deputy director's speech was in part as a citizen, rather than employee, the court held the speech was not on a matter of public concern. Instead, the email was an internal complaint, and not an attempt to change or influence department policies.

The deputy director also claimed retaliation for an internal complaint she made four months prior to the email incident, in which she reported that another female co-worker had on six occasions over the course of two months recounted details of the co-worker's sex life to the deputy director and other co-workers. The Fifth Circuit affirmed the summary judgment of the district court dismissing this claim as well, holding that the deputy director did not have a reasonable basis to believe the co-worker's comments were an unlawful unemployment practice of a sexually hostile work environment because the co-worker's conduct was not sufficiently severe or pervasive, and the deputy director did not allege the conduct interfered with her job duties or that she felt physically threatened by the co-worker.

2. *Rodriguez v. City of Corpus Christi*, 687 F. App'x 386 (5th Cir. 2017)

In *Rodriguez*, a city employee sued the City under Section 1983, claiming she was fired in retaliation for engaging in free speech. The employee was an administrative assistant at the municipal court. She witnessed an altercation between two other employees, and after the altercation a supervisor asked her to write and submit to human resources a statement about what she witnessed. She submitted the statement and was later terminated.

The district court ruled in the employee's favor, awarding the employee a half-million dollar judgment, but the Fifth Circuit reversed and dismissed the employee's case. The Fifth Circuit held that though the employee believed her action in submitting the statement was voluntary, the speech was employee

speech, not private speech, because the employee wrote the statement at the request of a superior as part of her job duties. The court stated that reporting an incident witnessed at work not to the public, but to the HR department "represents a chain-of-command complaint that is ordinarily within the scope of every public employee's duty."

3. *Coker v. Whittington*, 858 F.3d 304 (5th Cir. 2017)

In *Coker*, the Fifth Circuit affirmed a district court holding that sheriffs did not violate two employees' First Amendment rights of freedom of association when it enforced its Code of Conduct by terminating two officers who moved in with each other's wife and family before divorcing their current wives. The court considered the sheriff's department's interests in preventing such conduct on its police force and found that "preserving a cohesive police force and upholding the public trust and reputation of the Sheriff's Department" was a rational ground for terminating the officers for their conduct. Because the case involved law enforcement officers, the sexual decisions involved should be viewed in a different light. Police officers deal with crimes such as human trafficking and spousal abuse, which "place them in sensitive positions with members of the public." Thus, the district court did not err in entering judgment for the police department.

The Fifth Circuit noted that the Supreme Court's *Obergefell v. Hodges* decision did not change the applicable law because that decision "does not create 'rights' based on relationships that mock marriage." Instead, "*Obergefell* is expressly premised on the unique special bond created by the formal marital relationship and children of that relationship."

4. *Anderson v. Valdez*, 845 F.3d 580 (5th Cir. 2016)

In *Anderson*, at issue was whether a law clerk who reported unethical conduct of a chief judge stated a claim for retaliation based on protected speech. The law clerk's judge told the law clerk that the chief judge of the court was double-dipping from two separate funds for travel reimbursements. The law clerk reported this alleged conduct to the Texas Supreme Court and State Commission on Judicial Conduct. When the law clerk's judge left the court, the law clerk applied to work for another judge on the court and was told he had a job. But the chief judge of the court blocked the law clerk's rehire. The law clerk sued under Section 1983 for a violation of his free speech rights. The district court denied the chief judge's motion to dismiss.

On interlocutory appeal, the Fifth Circuit held that the law clerk's report to the Texas Supreme Court and State Commission was protected speech because, while the law clerk had an ethical duty to report the alleged misconduct, the law clerk was not acting pursuant to his job duties. The court focused on whether the speech was within the control of the employer, reasoning that "[i]f it is not lawful and appropriate for the employer to exercise control, the employee is, quite simply, not speaking pursuant to his official duties."

Also, while the chief judge claimed qualified immunity, arguing that the law clerk's rights were not clearly established at the time the chief judge retaliated because the Fifth Circuit had yet to rule on two relevant cases, the Fifth Circuit held that the law had nonetheless been clear enough that the chief

judge should have known that the law clerk's speech was protected.

5. ***Wetherbe v. Goebel***, No. 07–16–00179–CV, 2018 WL 1177633 (Tex. App.—Amarillo Mar. 6, 2018, no pet.).

In *Wetherbe*, a university professor sued alleging the university retaliated against him for his speech in published articles, including in the Harvard Business Review and the Wall Street Journal, against tenure in higher education. The trial court granted the university's plea to the jurisdiction, holding the professor's speech was not a matter of public concern and therefore was unprotected.

The Amarillo Court of Appeals reversed and remanded, holding that the content of the professor's speech was a matter of public concern because the speech was not "merely an extension of an employment dispute," and commented on tenure in general. The court of appeals stated the speech was in the context of an ongoing public debate about tenure, noting that there were numerous articles by other authors on the same topic.

6. ***Town of Shady Shores v. Swanson***, No. 02-15-00338-CV, 2018 WL 472902 (Tex. App.—Fort Worth Jan. 18, 2018, no pet.).

In *Swanson*, a town secretary sued the town alleging, among other claims, that the town violated her First Amendment rights when it terminated her after she reported allegedly illegal acts by the mayor. The secretary reported to and up the chain-of-command internally, and to the district attorney's office, that the mayor destroyed recordings of an investment meeting, removed the recordings from town hall, and intended to call her to a meeting under false pretenses so she would resign.

The district court denied the town's summary judgment motion, but the Fort Worth Court of Appeals reversed, holding the district court did not have jurisdiction over the free speech claim because the report was internal employee speech pursuant to the employee's job duties, not public speech. As to the external report to the district attorney's office, the court held the conduct could not have been retaliatory because the employee presented no evidence the town knew about that report when it terminated her. In addition, the mayor's plan to meet with her on false pretenses was not a matter of public concern.

7. ***Tex. Loc. Gov't Code § 150.041***

While not new, an update on public employees' First Amendment rights is not complete without a reminder of Section 150.041 of the Texas Local Government Code, enacted by the Legislature in 2013. The statute makes it unlawful for cities to prohibit their employees from running for office or disciplining or terminating its employees for the sole reason that the employee is a candidate for public office. The law also states that employees, of course, are still expected to fulfill their job duties and responsibilities as city employees.

D. Disability Discrimination and Accommodations Cases

1. *Patton v. Jacobs Engineering Grp., Inc.*, 874 F.3d 437 (5th Cir. 2017)

Patton, an engineer, sued his engineering firm and the staffing agency for hostile work environment and failure to accommodate his disabilities of stuttering, anxiety, and noise sensitivity. Patton alleged other employees mocked him because of his stutter, and that the employer failed to accommodate by not moving him to a quieter work area as he requested. The district court granted summary judgment for the employer on both claims.

The Fifth Circuit affirmed the summary judgment of the district court on both claims. Regarding the failure to accommodate claim, the court held in favor of the firm and agency because they were not aware that he was requesting to move to a quieter area *because of* his disabilities. Although Patton notified the staffing agency that his stuttering and anxiety issues "all [went] together" and that he was sensitive to noise, these statements were not clear enough to show that his noise sensitivity was caused by a disability. Similarly, while Patton asked the firm to move him to a different location because the loud noises at his current location aggravated his anxiety, this did not put the firm on notice that his anxiety was caused by a disability.

On the hostile-work-environment claim, the court stated that although Patton presented evidence that he experienced severe and pervasive harassment, he failed to challenge on appeal the district court's finding that he unreasonably failed to avail himself of the staffing agency's and firm's anti-harassment procedures. Therefore, Patton failed to show they knew or should have known of the harassment and failed to take prompt, remedial action.

2. *Credeur v. Louisiana*, 860 F.3d 785 (5th Cir. 2017)

Credeur, a litigation attorney for Louisiana's Office of Attorney General ("OAG") had serious health problems as a result of complications from a kidney transplant. The OAG accommodated by allowing her to telecommute temporarily for six months. Three years later she developed additional health problems and exhausted her leave under the Family and Medical Leave Act. She then again requested to telecommute as an accommodation for her disability. The OAG responded by granting her limited time to transition back into the office.

A few months later the OAG asked for an update on her status to return to work, and received conflicting responses from her doctors, one stating she could work up to three hours a day, another "as tolerated," and another stating she could not work in the office for six months. She began to fall behind on her work, neglected required administrative tasks, and several of her cases had to be reassigned to other attorneys. After additional interactive discussions, Credeur was instructed she had to work in the office and could no longer telecommute. Credeur did not return to work, exhausted her FMLA again, and then resigned.

Credeur then sued the OAG for failure to accommodate, disability-based harassment, and retaliation. The Fifth Circuit affirmed the summary judgment of the district court in favor of the OAG on all claims, and stated that "construing the ADA to require employers to offer the option of unlimited

telecommuting to a disabled employee would have a chilling effect."

On the accommodation claim, the court stated that "regular work-site attendance is an essential function of most jobs" and held Credeur was not qualified because the OAG presented evidence showing regular work-site attendance was an essential function of her job, as her job was interactive and team-oriented, and her continued absences disrupted workflow and caused a strain on the office. The court also stated that it was giving greatest weight to the employer's judgment as to what functions were essential.

Regarding the harassment claim, the court held that that the OAG's implementing work-related conditions to transition her back to working in the office is not harassment. Finally, for the retaliation claim, the court held there was no adverse employment action against her, as she suffered no disciplinary action and the leave without pay she complained of was at her request.

3. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017)

In *Severson*, the Seventh Circuit reaffirmed its position that under the ADA "a long-term leave of absence cannot be a reasonable accommodation" for a disability. In this case, the employee injured his back and was on FMLA leave for 12 months. At the end of this time, the employee requested three months of continued leave from his employer, but the employer denied the request and terminated the employee, offering the possibility of reapplying for a position when the employee was able to work again. The employee sued for failure to accommodate under the ADA.

The parties agreed that the employee was disabled and that an essential function of his job was to lift 50 pounds or more. Thus, the question presented to the court was whether the employer failed to provide a reasonable accommodation to the employee. While the court did not preclude "the possibility that a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances," it held that the leave at issue in the case—three months—was not a reasonable accommodation. The court's analysis hinged on the fact that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."

4. *Stevens v. Rite Aid Corporation*, 851 F.3d 224 (2nd Cir. 2017).

Plaintiff, a pharmacist, was fired for failure to comply with a company policy that required pharmacists to administer immunization injections to customers. The plaintiff sued for disability discrimination in the termination and failure to accommodate his disability, trypanophobia (fear of needles), by requiring him to administer the immunization injections. Following trial, the jury found that Rite Aid violated the ADAAA and awarded the plaintiff $1.7 million in back- and front-pay as well as non-pecuniary damages of $900,000 (the $900,000 was later reduced to $125,000 when the plaintiff agreed to a remittitur).

The Second Circuit reversed the jury's judgment on grounds that (1) performing immunization injections was an essential job requirement, (2) the plaintiff did not present evidence of a reasonable accommodation so he could perform the immunization injections, and (3) therefore, because the plaintiff was not qualified to perform the essential functions of his job, Rite Aid's termination of plaintiff was lawful. This case demonstrates the importance of updating job descriptions to account for changes

to job functions—because Rite Aid diligently updated the pharmacist job description when Rite Aid corporate decided to require pharmacists to perform immunizations, Rite Aid was able to effectively argue that the task was indeed an essential function of the job. Note that it is the employer's burden—not the employee's—to prove what the essential job functions are for ADAAA compliance.

5. *Tex. Dep't of Aging & Disability Servs. v. Comer*, No. 04–17–00224–CV, 2018 WL 521627 (Tex. App.—San Antonio Jan. 24, 2018, no pet.)

Comer, a "Direct Support Professional" (DSP) of the Texas Department of Aging and Disability Services (DADS) sued DADS for disability discrimination, failure to accommodate, and retaliation. Due to health issues, Comer's doctor directed that he could perform his job if he was accommodated by only being required to work an eight-hour shift, only at night, and work no overtime. Comer also filed a grievance with the EEOC about the failure to accommodate. DADS later terminated Comer because the job had mandatory overtime. DADS filed a plea to the jurisdiction, which the trial court denied.

The San Antonio Court of Appeals reversed and dismissed. On the disability discrimination and failure-to-accommodate claims, the court held that DADS produced evidence showing that mandatory overtime was an essential function of the DSP position thus conclusively negating the element that he was qualified for his job. On the retaliation claim, the court held that DADS produced evidence that it followed its personnel procedures in addressing Comer's absences and fitness-for-duty certification, and fired similarly situated employees who were not disabled, thus negating the element of a causal link between his grievance and the adverse employment action.

6. *Sepúlveda-Vargas v. Caribbean Rests., LLC*, 888 F.3d 549 (1st Cir. Apr. 30, 2018)

In *Sepúlveda-Vargas*, the First Circuit affirmed summary judgment against a manager at a fast-food restaurant, holding that the manager failed to raise genuine issues of material fact on his failure-to-accommodate and retaliation claims.

On the accommodation claim, the court held that rotating shifts—the requirement that an employee work at varying times of the day—were an essential function of the job of manager. The court gave deference to the restaurant's determination that rotating shifts were necessary to equally distribute work among managers. The court also noted that although the restaurant allowed the manager to work a fixed shift on a temporary basis, this action was not a concession that rotating shifts were inessential to the job.

On the retaliation claim, the court held the manager failed to show a hostile work environment that would constitute retaliation under the ADA. Although the manager credibly alleged, among other things, scolding, name calling, and different treatment from other managers, these allegations amounted to "nothing more than . . . petty insults and minor annoyances" that did not constitute an adverse employment action under the ADA.

7. *United States v. Dental Dreams, LLC*, No. Civ. 13–1141 JH/KBM, 2018 WL 1599767 (D.N.M. Mar. 28, 2018)

In *Dental Dreams*, the District of New Mexico held that a dentist raised issues of fact sufficient to survive

summary judgment on claims arising from use of a companion animal in the dental office. The dentist claimed, among other things, failure to accommodate and disability discrimination when his employer fired him after the employer refused to allow him to bring his companion dog to work. The dentist claimed that he needed the dog to alleviate his panic attacks arising out of his Generalized Anxiety Disorder.

On the accommodation claim, the court held the dentist raised an issue of fact as to whether the dog was a "service animal" under the ADA because a reasonable jury could find that, at the time of the dentist's termination, the dog was trained to perform tasks for the dentist's benefit. The dentist also raised an issue of fact as to whether the presence of his dog in the office was an undue hardship because the employer did not make an affirmative showing that the dog in the office was a "significant difficulty or expense" and because the employer did not initiate a process to address the issue of the dog in the office.

On the discrimination claim, the court held that the short amount of time between the employer's discovery of the dentist's disability and the dentist's termination—which was almost immediate, and the possibility that the employer's reasons for firing the dentist were pretextual raised an issue of fact that the dentist was terminated because of his disability.

8. *Church v. Sears Holding Corp.*, 605 F. App'x 119 (3d. Cir. 2015)

In *Church*, the Third Circuit touched briefly on presence of the spouse as an accommodation. An employee with short-term memory loss, speech difficulty, and muscle and balance difficulties claimed her employer failed to accommodate her disability when it refused to allow her to have her husband present during a meeting to discuss the job duties she could perform. The employee stated she needed her husband there so she could "feel safe." But the employee did not present evidence that her employer was aware she needed the husband there as a disability accommodation, or that her husband was going to assist her in any way with her disability. Therefore, the court affirmed summary judgment for the employer on the failure to accommodate claim.

III. FOCUS ON #METOO

It is impossible to ignore the recent tidal wave of allegations of sexual harassment by celebrities and other high-powered public figures that have resulted in firings, resignations, and public outcry to change attitudes as to what is considered acceptable behavior in the workplace. The #MeToo internet phenomenon emerged in its wake, serving as a call-out to victims of sexual harassment to raise awareness by sharing their stories on social media using the viral hashtag. Employers are concerned and are asking what, if anything, they should do differently in the face of this movement.

Actually, the law itself hasn't changed much at all. To be actionable, generally, sexual harassment still must be sufficiently severe or pervasive to constitute a hostile work environment, must be claimed in a charge of discrimination within 300 days of the last illegal act, and the employer must be aware of, or should have known of, the harassment and not taken prompt remedial action. Employers are still required to perform full and fair investigations of complaints before taking action against any person

accused of harassment. Employers should still have good policies that define and prohibit workplace harassment, provide a clear path for reporting outside the complainant's chain of command, and prohibit retaliation for complaining or participating in an investigation. The policies should be publicized and available to all employees, even those without computer access, and regular and quality training of all employees is necessary to reinforce the employer's position and procedures on workplace harassment.

SO WHAT HAS CHANGED??

1. The speed of exposure – Allegations made against an entity are immediately broadcast, often before the employer has a chance to investigate or formulate a response and sometimes before it learns of the complaint.
2. The age of the allegations – Despite the statute of limitations barring legal claims made after 300 days, Twitter knows no such limits, and expired claims from years ago can wreak fresh havoc on an employer, often with no means to defend itself. Any chance to investigate the merits of the claim is often long gone, along with the witnesses, documents and facts surrounding the allegation.
3. Some loss of stigma – The #MeToo movement is a call to action, demanding alleged victims to step up and be recognized, as an act of solidarity and bravery. Jumping in with one's own story, no matter how distant in time, is now viewed as a badge of honor.
4. Predicted increased claims – In 1992, the year following the Clarence Thomas/Anita Hill televised confirmation hearing in October 1991, workplace sexual harassment charges filed with the EEOC skyrocketed 53 percent as compared to 1991. Claims in the last quarter of 1991 also increased dramatically. Everyone was talking about sexual harassment and discussing where the boundaries were. Now, with the intense publicity surrounding the #MeToo movement, and the valorization of women telling their stories (unlike the vilification of Anita Hill), it is expected that the statistics coming out of 2018 will also show dramatic increases in claims.
5. Employers may become aware of claims via #MeToo posts, and have an obligation to investigate – Under the "knew or should have known" theory of employer liability, if the plaintiff can show the employer was aware of the employee's social media posts about workplace harassment, regularly monitors them, or otherwise should have been aware, then it is responsible for responding to them.
6. Using #MeToo references to influence settlements and juries – we are seeing discussions of the movement in long preambles to demand letters, and references in arguments to courts and juries. Moreover, the movement may be loosening evidentiary rulings on allowing "me too" evidence into trials.
7. Increased workplace training – The publicity of the allegations have led to a surge in requests for workplace harassment training. Management who a year ago did not want to spend the money on professional training, have suddenly gotten with the program and supported workplace-wide training. It is important for senior management to be seen by employees attending the training, to send the message that the top brass supports the initiative.

8. Employers are developing crisis management plans – The speed at which allegations can transverse social media and create a full-fledged public relations nightmare is astounding. That should not be the time that employers are first developing a response and mitigation plan. A plan of action, developed in advance, could save precious hours or days of the allegations going viral and beyond repair.

9. Backlash against women based on fear? – Unintended consequences – We are starting to hear anecdotal reports of executives and businesses promulgating rules and/or personal conduct decisions for men to avoid being alone with women in business-related social or travel situations. The dialog began with the "Pence Rule" where Vice President Mike Pence was quoted in 2017 as stating that he refuses to dine alone with a woman not his wife, so as to avoid both temptation and misunderstandings. This "prophylactic gender separation" can have a devastating effect on women in business who may be unable to network effectively. And a female executive would have trouble staying in power abiding by the same rule. It also means that someone like Pence could not hire a woman as a personal assistant if late nights or travel were involved. In Silicon Valley, some male investors have declined one-on-one meetings with women. In Austin, a city official was reprimanded in 2017 for refusing to take meetings with women, stating "I've been told it is not appropriate for a married man to have lunch with a single lady." www.nytimes.com/ 2017/09/15/us/austin-william-manno-sxsw. This type of conduct could certainly translate into a claim of sex discrimination, especially if it can be shown to have an effect on women's careers.

10. Focus now on more than legal limits – Employers are more concerned than ever about publicity and economic damage surrounding claims that might not otherwise have a legal basis. Behavior that may be legal, such as harassing men and women equally, can still cause significant problems for employers when it becomes fodder for social media discussions. Employers are adding bullying and respectful behavior policies to their handbooks, and training not only on the law, but also what is right and what can have a financial or public relations impact. For example, some employers are prohibiting high-ranking executives from off-duty or business development behavior that could reflect back badly if a photo is captured and posted on Facebook, such as attending strip clubs or engaging in other public sexually-oriented behavior that could be seen as disrespectful to women. Employers are refocusing on preventing excessive drinking or misbehavior at holiday parties and out-of-town events. Now, more than ever, senior management is being watched carefully, and must "walk the walk."

BASIC GUIDANCE FOR PREVENTING AND RESPONDING TO WORKPLACE COMPLAINTS:

1. Review anti-harassment policy to ensure it has a strong statement against workplace harassment and clear reporting procedures.

The organization should have an anti-harassment policy that includes a clear statement that sexual harassment is prohibited and that such conduct is unlawful. The statement should inform employees that if they engage in harassment, whether a manager, supervisor, or employee, they will be subject to disciplinary action, up to and including termination.

The policy should define sexual harassment as (i) unwelcome sexual advances; (ii) requests for sexual favors; and/or (iii) other verbal or physical conduct of a sexual nature when submission to the conduct is a term or condition of employment, is used as a basis for employment decisions, interferes with the employee's work performance, or creates an intimidating, hostile, or offensive work environment. The policy should provide examples of verbal, physical, and visual conduct that constitutes sexual harassment, while cautioning employees that the examples are not all inclusive. The policy must inform employees that they will not be retaliated against for complaining of harassment, reporting harassing behavior, or for participating in an investigation regarding a harassment claim.

In addition, the policy must include a procedure for employees to report harassment, including multiple avenues to report if reporting to a direct supervisor or manager is insufficient or the offender is the individual's direct supervisor or manager. The procedure should assure employees that reports will be investigated promptly and thoroughly, will be kept as confidential as possible, and that the organization will take swift action if it is determined that harassment occurred. A benefit of a reporting procedure is that an employer can assert a defense against liability if it can show it had a policy against harassment with a reporting procedure but that the employee unreasonably failed to use the reporting procedure.

2. Remind employees of the anti-harassment policy and reporting procedures to reinforce that the workplace is one where employees should feel comfortable speaking out, and so any current issues can be addressed as soon as possible.

Regardless of whether the employer has a current problem with workplace harassment, now is a good time to remind employees of its anti-harassment policy and reporting procedures. The employer can send out an email with a copy of the policy and procedure and let employees know where the policy can be found in the handbook. The communication should assure employees that their complaints will be kept as confidential as possible and that the organization has an open-door policy, takes complaints seriously, and will address reports promptly and thoroughly. Learning about harassment complaints early, or while they are still minor, can allow resolution before things get out of control.

3. Train all employees, including supervisors and management, on the organization's anti-harassment policies and reporting procedures.

Training is a valuable tool for preventing harassment from occurring in the workplace, and to increase the likelihood that any harassing behavior will be reported so it can be addressed before the situation escalates. The training should provide management and employees with a clear and uniform understanding of what type of behavior is prohibited, how to report harassing conduct, how the organization will investigate complaints, and that retaliation is forbidden. Managers and supervisors should also be trained on how to respond to complaints from employees, no matter how minor, to foster a workplace environment that is professional and respectful, and guidelines for discipline of harassers. Managers should also be reminded that any romantic or sexual advances toward subordinate employees violate the anti-harassment policy and place them and the organization at legal and reputational risk.

Training must occur periodically and not just one time. How often may depend on the rate of turnover and the rate of promotion to supervisor and manager positions. Employers with seasonal employees might have to train much more frequently, as all employees, not just those who are regular, full-time, must be aware of the workplace harassment and discrimination policies.

Top management should reinforce the importance of the training by their attendance. Some go so far as to introduce each session and stress its importance.

In 2016, the EEOC completed and reported on its Select Task Force's findings on preventing workplace harassment, and created checklists for employers. Regarding training, the EEOC expects employers to provide "repeated and reinforced training on a regular basis" that is "supported at the highest levels" to "all employees at every level of the organization." The training should be live whenever feasible and conducted by qualified, interactive trainers. www.eeoc.gov/eeoc/task_force/harassment/checklist4.cfm.

4. Respond to complaints by investigating seriously, thoroughly, and promptly.

Upon receipt of a complaint, respond immediately to address the situation not only to reduce the organization's legal liability but also to show employees that their employer does not just pay lip service to its anti-harassment policy and reporting procedures, and that it takes harassment complaints seriously. Investigations should be conducted by a neutral party, whether that is HR, management, or outside consultants and/or legal counsel. The complainant should be interviewed and the discussion documented with details as to who engaged in the conduct, how the accuser has been affected, what the conduct consisted of, when the conduct occurred, and where it occurred. It should be determined whether anyone else has information that can assist in the investigation, and if so, those individuals should be interviewed as well. The person accused should be interviewed with a full opportunity to respond to the charges and provide other witnesses. Any written evidence, such as phone records, texts and posts, should be gathered and preserved. Based on the information gathered, each party's credibility should be weighed along with the facts presented to determine whether the conduct complained of occurred. The standard is not so high that it must be determined beyond a reasonable doubt that the conduct occurred, only that the employer has a reasonable belief, based on the information presented, that the harassing conduct occurred. If the results are inconclusive, the complainant should be informed of the results and the situation should continue to be monitored.