

Employment Law Update: Sex, Drugs, and Tweets Galore

Presented to:

Texas City Attorneys Association

Presented by:

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2017 EMPLOYMENT LAW UPDATES

- EEOC Activity
- Social Media Case Law
- Title VII Sexual Orientation, Transgender, and Gender Stereotyping Case Law and Legislation
- ADAAA Accommodation Case Law
- Texas Legislature Activity
- Presidential Actions

Recent Social Media and Free Speech Cases of Note

CAN SOCIAL MEDIA POLICY ITSELF BE UNCONSTITUTIONAL?

Liverman v. City of Petersburg, 844 F.3d 400 (4th Cir. Dec. 15, 2016)

Policy language:

- » No posting anything that would tend to discredit or reflect unfavorably upon Department or its employees
- » Negative comments on internal operations, or conduct of supervisors or peers that impacts public's perception of department is not protected by the 1st Amendment
- » Officers may comment on issues of public concern (as opposed to personal grievances) if comments don't disrupt workplace, interfere with work relationships or workflow, or undermine public confidence. Judged on case-by-case basis.
- » Officers strongly discouraged from posting information regarding off-duty activities, and violations will be forwarded to Chief for appropriate disciplinary action

Liverman, cont'd

» Lower federal court (Virginia) held:

- FB comments about promotional process/rookie supervisors affecting public safety protected – public concern
- FB reply comments about not respecting an inexperienced sergeant not protected – private grievance
- Chief had qualified immunity on violation because law not clearly established

Liverman, cont'd

- » 4th Cir instead focused on policy as overbroad prior restraint
 - Policy can't impede "broad category of expression" and "chill potential speech before it happens" unless outweighed by real harms
 - "Restraint is virtual blanket prohibition on all critical speech"
 - "Astonishing breadth" of social media policy language
 - "Squashes speech on matters of public import at the very outset"
 - Fear of divisiveness too speculative, not actual
 - Free speech disclaimer correct but buried
- » Posts were matter of public concern – can't separate - read as single conversation about rookies thrust into teaching roles
- » No qualified immunity for chief – clearly established that sweeping prior restraint prohibiting "any negative comments" on internal operations or conduct of employees

City of Meridian v. Meadors, --- So.3d ---, 2016 WL 7636445, (Ct. App. Miss. Dec. 6, 2016)



Johnny Cop

2:38 am

Yesterday the chief of police and the city manager had a meeting...



Like · Comment · Edit · Delete



I'll probably get in trouble for this

Like · Edit · Delete

Recent Sexual Orientation and Transgender Discrimination Cases of Note

Hively v. Ivy, 853 F.3d 339 (7th Cir. Apr. 4, 2017)

- First federal appellate court ruling that sexual orientation discrimination is Title VII sex discrimination
- “pure question of statutory interpretation”: sexual orientation discrimination is prohibited as sex discrimination
- “Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils” *Oncale* (USSC ’98)

Baker v. Aetna Life Ins. Co., -- F.Supp.3d--, 2017 WL 131658 (ND. Tex. Jan. 13, 2017).

- “Gender Dysphoria”
- Employer and insurer refusing to cover breast augmentation surgery and denial of STD
- Of many claims, court upheld Title VII claim
 - Adverse employment action consists of “hiring, firing, demoting, promoting, granting leave, and compensating”
 - Denial of employment benefits based on sex

PREVENTING CLAIMS

- Err on the side of accommodation, non-discrimination and non-harassment
- Transition plan?
 - Remind coworkers about EEOC position on bathroom choice, pronouns and harassment
 - Encourage employee to let you know of problems
 - Encourage employee to discuss transition in meeting with coworkers
 - Issue updated name and sex id's (name plate, HR records, IT screen name, etc)
 - Dress according to dress code for chosen gender
 - Use restroom of choice, while remaining sensitive to privacy of others

Recent ADAAA Accommodation Cases of Note

SERVICE ANIMALS AS AN ACCOMMODATION

EEOC v. CRST, Intl. Inc./CRST Expedited Inc., No. 3:2017-cv-00241-TJC-JBT, (M.D. Fla. Mar. 2, 2017)

- Leon, a veteran, applied to be a truck driver for CRST
- After being accepted to training program but before completing it, Leon disclosed that he suffered from anxiety and PTSD and needed to use a service dog to control anxiety and wake him from nightmares
- Leon successfully completed the training program, but was not hired
- Around the time CRST denied Leon employment, CRST developed a service dog policy
- Leon not given opportunity to qualify under policy
- Case still pending in the U.S. District Court for Middle District of Florida

SERVICE ANIMAL AGREEMENTS?



Stevens v. Rite Aid Corp., 851 F.3d 224 (2d Cir. Mar. 21, 2017).

- Pharmacist with trypanophobia
- Fired for failing to comply with new policy that required pharmacists to administer immunization injections
- In disability discrimination suit, jury awarded \$1.7 million in front and back pay
- 2d Cir. reversed holding firing was lawful because he couldn't perform essential job function
- Performing injections is essential job requirement and Pharmacist did not present evidence of reasonable accommodations to allow him to perform injections

THANK YOU, AND GOOD LUCK!



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