JEOPARDY QUESTIONS—2015 TCAA SUMMER CONFERENCE

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CATEGORY: THE SUPREME COURT

$100

A co-tenant can allow a home search after the defendant has been arrested.

True.

In *Fernandez v. California*, 134 S.Ct. 1126 (2014), the Supreme Court held that if a defendant objects to the search of his or her home, that objection may be overridden by a co-tenant after the defendant is no longer present. Walter Fernandez told police they could not search his home, but after he was arrested and removed from the premises for suspected domestic violence, the woman he was living with consented to a search. While the defendant pointed out the police were responsible for his absence, the Supreme Court noted that his removal was objectively reasonable.

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An anonymous 9-1-1 call about dangerous driving can give police probable cause to stop a driver.

True.

In *Navarette v. California*, 134 S.Ct. 1683 (2014), an anonymous 9-1-1 caller reported that a vehicle had run her off the road. The Court held 5-4 that a police stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated. The tip of dangerous driving was sufficiently reliable because by identifying specific details about the vehicle, the caller necessarily claimed eyewitness knowledge of what happened, police located the vehicle where the caller indicated it would be, and the caller used the 9-1-1 system, which readily identifies callers and therefore discourages them from lying. While the officer did not observe additional suspicious conduct after spotting the vehicle and watching it for 5 minutes, police do not have to give suspected drunk drivers a "second chance for dangerous conduct [that] could have disastrous consequences." This case is noteworthy because the Supreme Court departed from the normal Fourth Amendment requirement that anonymous tips be corroborated.

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When denying an application to build a cell tower, a city is required to give the applicant the reasons for denial at the time of the city council's action.

False.

In a 6-3 decision, the Supreme Court in *T-Mobile South v. City of Roswell,* 574 U.S. ___ (Jan. 14, 2015), held that local governments are not required to provide their reasons for denying cell tower siting applications in the denial notice itself, but may state those reasons with sufficient clarity in some other written record "issued essentially contemporaneously with the denial." In this case, the City of Roswell, Georgia, failed to comply with its statutory obligations under the Telecommunications Act of 1996. *See* 47 U.S.C. § 332(c)(7)(B)(iii) (a locality must provide reasons when it denies applications to build cell phone towers). Although the city issued its reasons in writing and did so in an acceptable form (its city council minutes), it did not provide its written reasons essentially contemporaneously with its written denial when it issued detailed minutes 26 days after the date of the written denial and 4 days before expiration of the cell phone company's time to seek judicial review.

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An employer must pay an employee for "changing clothes" at the beginning and end of a work day.

False.

In *Sandifer v. U.S. Steel Corp.*, 134 S.Ct. 870 (2014), the Supreme Court held that donning and doffing protective gear qualifies as "changing clothes" under 29 U.S.C. § 203(o), which allows parties to decide as part of a collective bargaining agreement whether time spent changing clothes at the beginning and end of a work day is noncompensable. Sandifer contended that donning and doffing protective gear was not just "changing clothes." The Court disagreed, stating that clothing can include items worn for protection, and that changing clothes can include altering street clothes with protective gear.

CATEGORY: EMPLOYMENT LAW

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A corporation may acquire a racial identity and thereby have standing to sue for race discrimination under Title VII.

True.

In *Carnell Construction v. Danville*, 745 F.3d 703 (4th Cir. 2014), the Fourth Circuit in a matter of first impression held that a corporation may acquire a racial identity and establish standing to seek a remedy for alleged race discrimination under Title VII. Here, a state-certified minority-owned contractor was determined to have an imputed racial identity for purposes of establishing standing to bring a claim of race discrimination under Title VII.

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Since Title VII does not prohibit sexual orientation discrimination, some federal circuit courts are allowing gender stereotyping as an alternative means of recovery for such alleged discrimination.

True.

While most federal court have cautiously guarded against allowing gay or lesbian plaintiffs to use gender stereotyping claims as a means for litigating sexual orientation discrimination claims "through the back door," in *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009), the Third Circuit attempted to strike a more balanced approach to the issue. The plaintiff, a gay machine operator, alleged that he was called "princess" and other homophobic slurs, similar to the plaintiffs in *Boh Brothers* and *Vickers*. The plaintiff also alleged that he was the victim of lewd sexual jokes and gestures. In allowing the *Prowel* plaintiff's claim to proceed, the Third Circuit reasoned that a gay plaintiff could be discriminated against both for failing to conform to gender stereotypes and for his sexual orientation, but that this dual nature should not bar the plaintiff from proceeding with a sex discrimination claim under Title VII.

In holding that the *Prowel* plaintiff could proceed with a gender stereotyping claim under Title VII—despite the fact that his harassment involved homophobic slurs and anti-gay sentiment—the Third Circuit reasoned: "It is possible that the harassment [plaintiff] allege[d] was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that [plaintiff] was also harassed for his failure to conform to gender stereotypes." Noting that the alleged harassers had made reference to his clothing, the way he crossed his legs and filed his nails, and the way he walked, the court observed that such remarks constituted "sufficient evidence of gender stereotyping harassment—namely, [plaintiff] was harassed because he did not conform to [his co-workers'] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation." Notably, the Third Circuit reasoned that "there is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not. Accordingly, the Third Circuit found that the plaintiff had a viable gender stereotyping claim despite the anti-gay nature of much of the harassment, and despite his sexual orientation. Unlike the plaintiffs in *Boh Brothers* and *Vickers*, the *Prowel* plaintiff presented evidence suggesting that his workplace behavior differed from that of his male co-workers. The *Prowel* plaintiff claimed that he had a high voice and did not curse; was well groomed and wore "dressy" clothes, carried himself in an

effeminate manner; and talked about art, music and interior design. The plaintiff claimed that his co-workers reacted negatively to his demeanor and appearance, taunted him with anti-gay epithets, left lewd drawings in the workplace, made threatening statements such as "they should shoot all fa-s," and accused him of having AIDS and sleeping with male co-workers. The allegations allowed the *Prowel* court to identify a viable gender stereotyping claim separate and apart from a nonviable claim based solely on the plaintiff's sexual orientation.

The Fifth Circuit, in *Equal Employment Opportunity Commission v. Boh Brothers Construction Co.*, 731 F.3d 444 (5th Cir. 2013), allowed a straight male to bring a gender stereotyping claim and in *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), the Sixth Circuit dismissed a similar gender stereotyping claim brought by a gay man. The Sixth Circuit rejected the *Vickers* plaintiff's gender stereotyping claim. According to the Sixth Circuit, recognizing the plaintiff's theory of the case would effectively amend Title VII to allow sexual claims based on sexual orientation. "[I]n all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory . . . as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." The Sixth Circuit also found that the plaintiff had failed to show that his gender nonconformance was demonstrable in the workplace through his appearance or behavior. The plaintiff had "made no argument that his appearance or mannerisms on the job were perceived as gender nonconforming in some way and provided the basis for the harassment he experienced." The Sixth Circuit cited the Second Circuit's decision in *Dawson v. Bumble & Bumble*, 398 F.3d 211(2d Cir. 2005), a case involving a gay female employee, for the proposition that a "gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII."

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Visible pornography in the workplace and a single confrontation involving sexist remarks creates a sexually hostile work environment.

False.

In *Williams v. CSX*, 533 Fed. Appx. 637 (6th Cir. 2013), in an unpublished decision, the Sixth Circuit held that the mere presence of visible pornography in the workplace and a single confrontation involving sexist remarks does not create a sexually hostile work environment. Ms. Williams was an African-American janitorial clerk who contended that she was treated differently than her white male counterparts. She was required to do such things as (i) clean feces off a wall and out of a urinal, (ii) on four separate occasions she had to strip the restroom floor using an inappropriate tool and a request for a power tool was denied due to lack of funds, (iii) she was not reimbursed mileage charges while white males were reimbursed, and (iv) her car was "keyed" in the parking lot and her tires were punctured. She also contended that two supervisors were watching the Republican National Convention on television in 2004 when she entered and indicated she did not want to watch. One supervisor allegedly told her that she was

a Democrat only because she was a black woman; that unmarried women cannot "have the love of God in their heart[s]"; and that this country should "get rid of" Jesse Jackson and Al Sharpton because without those two "monkeys" the country "would be a whole lot better." The following day, she alleged that the same supervisor told her that if she returned to school, she would not have to pay for her education because she was a single black mother. At a later date the supervisor also made two racist statements in passing to her between one to six months before the confrontation, asking her why black people cannot name their children "stuff that people can pronounce, like John or Sue," and that black people should "go back to where [they] came from." Also, one of her co-workers kept pornography magazines at work, which they sometimes left in plain view on tables and in an unlocked locker. The court held the mere presence of pornography in the workplace combined with a single confrontation involving sexist remarks do not constitute a hostile work environment.

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An employee who "makes up" a job position and induces an applicant to grant him sexual favors in return for her selection for the non-existent job has a viable Title VII claim against the employer.

False.

In *Wilson v. Cook Co.*, 742 F.3d 775 (7th Cir. 2014), the Seventh Circuit held that there is no Title VII cause of action against the employer since an employment relationship cannot exist with regard to a job that never existed. Here, a male political operative (who had no hiring authority) in the in a suburban Chicago public hospital offered a physical therapist job to the plaintiff, although she did not have a degree or license), the operative explained he could "make things happen because certain people owed him favors." He collected her resume, gave her a legitimate County job application form, fingerprint form and insurance paperwork. She later returned to his office with her birth certificate and social security card, and at that meeting he told her that if she really wanted the job, "she had to kiss and massage him." She removed her clothes and he kissed her. Later, when she had hesitations about accepting the job, she agreed to have him visit her at her home massage studio. There, the two removed their clothes and she manually stimulated him. In an attempt to prolong the scheme, he then had a female friend call the woman, posing as an HR employee, and explain to her that there was a new position that paid $10,000 more but would require that he get another massage. She called the HR department and ultimately found out there never had been a position and eventually he plead guilty to charges of official misconduct and bribery.

CATEGORY: MUNICIPAL POTPOURRI

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The government must have a compelling interest to prohibit an employee from carrying her 3-inch Sikh ceremonial dagger in a government building.

True.

In *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013), the Fifth Circuit held that the government must have a compelling interest to prohibit an IRS employee from carrying her kirpan, a Sikh ceremonial 3-inch dagger which often has an edge that is curved or blunted, in a government building (the Mickey Leland Federal Building in downtown Houston) because its blade is longer than permitted by applicable law. She originally carried a 9-inch kirpan (and made it through the federal building's metal detector) but began wearing a shorter kirpan in hopes that it would alleviate the security concerns. The IRS offered (1) wearing a kirpan with a blade shorter than 2.5 inches, (2) wearing a dulled blade, (3) wearing a "symbolic kirpan" encased in plastic or Lucite, or (5) leaving her kirpan at home or in her car while she was in the federal building. Her Sikh Coalition attorney responded that doing so would violate her conscience and religious mandates. The case was remanded, in part, to determine whether the plaintiff holds a sincere religious belief in wearing a kirpan with a blade exceeding the federally prescribed maximum of 2.5 inches.

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An employer may require an Islamic employee to conduct his noon-time prayer in his car, outside or off-site rather than in the main lobby.

True.

In *Farah v. A-1 Careers*, 2013 WL 6095118 (D. Kan. 2013), a Kansas federal district court held that such a requirement is not a violation of the First Amendment. The plaintiff had started praying in the lobby of an office building and other tenants objected. He was offered several other locations to pray (in his car, in the building courtyard and/or off-site), and the plaintiff had objections to each location. He suggested an accommodation of allowing him to pray in the HR Director's office, but the HR Director objected since it was regularly occupied and contained confidential files. After additional attempts to accommodate the plaintiff, he continued to pray in the lobby and ultimately was told he could not continue to do so, and was terminated. The court concluded that the company had reasonably accommodated his religious beliefs by offering to let him go off-site daily for his noon prayers.

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Certain Texas cities may extend their hotel occupancy tax into the extraterritorial jurisdiction.

True.

According to Section 351.0025, cities under 35,000 population by ordinance may extend the hotel occupancy tax to the ETJ; however, they may not impose a tax under this

section if as a result of the adoption the combined rate of state, county, and municipal hotel occupancy taxes in the extraterritorial jurisdiction exceeds 15 percent of the price paid for a room in a hotel.

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A zoning applicant's attorney may contact the mayor or a city council member to discuss the pending land use matter before the city council.

False.

While there is no prohibition against a non-attorney zoning applicant contacting the mayor or a councilmember to discuss his/her pending application, an attorney for the applicant may run afoul of the rules of professional responsibility (and thus possibly be subject to a grievance being filed against him/her) if he/she contacts the mayor or a councilmember without contacting the local government's attorney. *See* Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct; Texas Supreme Court Ethics Opinion 474 (June 1991), determining that Rule 4.02 prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation.

CATEGORY: THE THIN BLUE LINE (POLICE)

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As a general rule, police may search the cell phone of an arrestee.

False.

In *Riley v. California*, 134 S.Ct. 2473 (2014), the Court held that the police generally may not, without a warrant, search digital information on a cellphone seized from an individual who has been arrested. The interest in (i) protecting police officers' safety and (ii) preventing the destruction of evidence did not justify dispensing with the warrant requirement for searches of cell phone data.

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Police officers who gave false information to prompt a doctor's non-consensual, invasive search of an arrestee's rectum are nonetheless protected by qualified immunity.

False.

In *George v. Edholm*, 752 F.3d 1206 (9th Cir. 2014), the Ninth Circuit held that police officers were not entitled to qualified immunity as to arrestee's Fourth Amendment unlawful search claim where the officers gave false information to hospital staff that

prompted an involuntary search of the arrestee's rectum, even though a baggie of cocaine was recovered. The false information was about the arrestee's medical condition (whether the arrestee was having a seizure) and whether the arrestee had also swallowed cocaine, in addition to their belief that the arrestee was hiding a baggie of cocaine in his rectum.

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A person's consent given to an officer to search a cell phone's records also includes consent for the officer to answer the cell phone when it rings and pose as the phone's owner during ensuing conversations.

False.

In *United States v. Lopez-Cruz*, 730 F.3d 803 (9th Cir. 2013), a border patrol agent stopped a car he believed to be involved in smuggling undocumented individuals into the United States from Mexico. Seeing two cell phones on the center console, the officer asked the driver if he could look at the phones and search them. The driver said yes. The officer took the phones, and soon one of them rang. The officer answered the phone rather than ignoring the call or asking permission to answer it. The caller asked, "How many did you pick up?" The officer responded, "none," and the caller hung up. The phone rang again less than two minutes later. The officer answered again and a different caller asked, "How did it go?" The officer replied in Spanish, "I didn't pick up anybody. There [were] too many Border Patrol in the area." The caller told him to return to San Diego. Shortly thereafter, the caller phoned again, believing she was speaking with the car's driver, but instead informed the officer that there were two people next to a house where there was a lot of lighting, and gave instructions to drive there, flash his high beams, and the two people would come out. The officer followed the instructions, and arrested to two Mexican citizens who did not have documents. The court found the officer's actions to be an unlawful search in violation of the Fourth Amendment because the consensual search exceeded the scope of the consent given.

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A city ordinance that requires hotel operators to keep certain information regarding hotel guests for 90 days and allow police officers to conduct warrantless, on-site inspections of that information is lawful under the Fourth Amendment.

False.

In *Patel v. City of Los Angeles*, 738 F.3d 1058 (9th Cir. 2013), the Ninth Circuit found that not only is a police officer's non-consensual inspection of hotel records pursuant to a municipal ordinance a "search" under the Fourth Amendment, the municipal ordinance itself is facially invalid under the Fourth Amendment. Los Angeles Municipal Code § 41.49 requires hotel and motel operator to collect and record the following information

about their guests: name and address; number of people in the guest's party; make, model and license plate number of the guest's vehicle; the guest's date and time of arrival and schooled date of departure; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment; and additional information. These records must be kept on the hotel premises in the guest reception or guest check-in area or a nearby office for 90 days. The hotel must make this information available to any officer of the LAPD for inspection without consent or a search warrant. The court found that § 41.49 lacked essential procedural safeguards against arbitrary or abusive inspections by police.

Please note: At the time this paper was written, *Patel* had been argued in the U.S. Supreme Court and a decision had not yet been rendered by the Court.

FINAL JEOPARDY QUESTION

The neighbor's actions constitute the crime of disorderly conduct, an offensive gesture in a public place, and the gesture tends to incite an immediate breach of the peace [Tex. Penal Code § 42.01(a)(2)].

Either True or False!

Sorry for the trick question, but this case is pending in a North Texas municipal court, awaiting a jury verdict!

THANK YOU FOR PLAYING!