Public Employment Law Update

May 13, 2016

UNC
SCHOOL OF GOVERNMENT

AGENDA
PUBLIC EMPLOYMENT LAW UPDATE
MAY 13, 2016

8:00	**Registration Opens**
9:00-10:00	**The Most Important Public Employment Law Developments of the Last Year** *Diane M. Juffra*s, School of Government
10:00-10:30	**Break**
10:30-11:15	**Negotiated Resignations** *DeWitt F. ("Mac") McCarley*, Partner, Parker Poe, Charlotte *Sarah Ford*, Partner, Parker Poe, Raleigh
11:15-12:00	**House Bill 2, Public Employers and Bathrooms** *Bob Joyce*, School of Government
12:00-1:00	**Lunch Service Begins (Trillium Room)**
1:00-2:00	**Understanding Retaliation Claims** *J. Travis Hockaday*, Partner, Smith Anderson, Raleigh
2:00-2:15	**Break**
2:15-3:15	**Applying Performance and Conduct Standards under the ADA** *Drake Maynard*, Drake Maynard HR Services
3:15-3:30	**Break**
3:30-4:15	**Update and Question and Answer Session on Proposed New FLSA Regulations** *Diane Juffras and Drake Maynard*
4:15	**Final Adjournment**

Speaker Biographies

Diane M. Juffras (*Most Important Employment Law Developments; FLSA Q & A*) – Diane is Professor of Public Law and Government at the School of Government, where she specializes in public employment law. Before joining the School of Government in 2001, she was in private legal practice in Connecticut. You can contact Diane at (919) 843-4926 or at juffras@sog.unc.edu .

DeWitt F. ("Mac") McCarley (*Negotiated Resignations*) – Mac is a partner in the Charlotte office of the law firm Parker Poe, where he concentrates his practice in advising local governments and private sector clients in regulatory and public policy matters. Before joining Parker Poe, Mac served as Charlotte City Attorney for 17 years. Greenville City Attorney for 14 years, and as the Assistant General Counsel for the North Carolina League of Municipalities. You can contact Mac at (704) 335-9519 or at macmccarley@parkerpoe.com .

Sarah Ford (*Negotiated Resignations*) – Sarah is a partner in the Raleigh office of the law firm Parker Poe, where she assists employers in the areas of compliance counseling, internal investigations and litigation. Sarah represents employers in matters before the EEOC, Citizenship and Immigration Services (USCIS), the Civil Rights Division of the U.S. Department of Education and the U.S. Departments of Labor. You can contact Sarah at (919) 835-4507 or at sarahford@parkerpoe.com .

Bob Joyce (*House Bill 2, Public Employers and Bathrooms*) – Bob is the Charles Edwin Hinsdale Professor of Public Law and Government at the School of Government, where he works in the areas of employment law, school law (especially schools as employers), higher education law and elections law. Bob joined the School of Government (then the Institute of Government) in 1980 after practicing law in both New York City and Pittsboro. You can contact Bob at (919) 966-6860 or at joyce@sog.unc.edu .

J. Travis Hockaday (*Understanding Retaliation Claims*) – Travis has practiced with the Smith Anderson law firm in Raleigh since September 2003. His practice focuses on providing employment-related counseling and risk management advice to clients in a variety of industries, both public and private. He also has represented clients in state and federal courts and agencies throughout North Carolina and other jurisdictions. His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims; defending wage and hour, ERISA, and other benefit-related claims; and representing clients in investigations conducted by, and proceedings before, both federal and state departments of labor, the Equal Employment Opportunity Commission, the U.S. Department of Justice, and the North Carolina Division of Employment Security.. You can contact Travis at (919) 821-6757 or at tockaday@smithanderson.com .

Drake Maynard (*Applying Performance and Conduct Standards under the ADA; FLSA Q & A*) – Drake provides human resources consulting and technical advice and training in the areas of employee relations, policy development and implementation, management development and training and legal aspects of human resources administration and compliance through his consulting firm Drake Maynard HR Services. Drake began his consulting business in January 2011after retiring from the Office of State Personnel, where he was Director of the Employee Relations Division. From 1992 – 2003, he served as Senior Director of Human Resources Administration at UNC-Chapel Hill. You can contact Drake at (919) 259-3415 or at dmhrservices@gmail.com .

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The Top Important Public Employment Law Developments of the Last Year

Diane M. Juffras, School of Government

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The Most Important Public Employment Law Cases: May 8, 2015 – May 13, 2016

Public Employment Law Update
May 13, 2016

Diane M. Juffras
School of Government

THE TEACHER TENURE CASE

1. North Carolina Association of Educators, Inc. v. State of North Carolina
(North Carolina Supreme Court, April 15, 2016)

Question Presented:
Whether the North Carolina General Assembly's repeal of the teacher tenure law as it applies to teachers who already achieved tenure violates the Contracts Clause of the U.S. Constitution and the Law of the Land Clause of the North Carolina Constitution?

Holding:
Applying the three-factor test for Contract Clause claims set out in Bailey v. State (1998), the North Carolina Supreme Court found that 1) the repeal of the teacher tenure law was a substantial impairment of the contracts that school systems had made with teachers who had already achieved tenure, and 2) that this impairment was not a reasonable and necessary means of serving a legitimate public interest. It therefore held that the repeal is unconstitutional based on the Contract Clause of the U.S. Constitution. Given the above holding, the court found it unnecessary to decide the claim brought under the Law of the Land clause.

TITLE VII

2. EEOC v. Abercrombie & Fitch Stores, Inc., ___ U.S. ___, 135 S.Ct. 2028 (2015).

Question:
Can an employer be liable under Title VII for failing to accommodate a religious practice if the applicant or employee actually not actually informed the employer of the need for an accommodation?

Holding:
Title VII does not impose a knowledge requirement on an employer in a discrimination case, but focuses only on motive. Title VII does not require an employer to have actual knowledge of the need for a religious accommodation to be liable for discrimination based on religion. An employer who rejects an applicant or discriminates against an employee based on a suspicion or assumption that the employee will need an accommodation also violates Title VII.

3. **Foster v. Univ. of Maryland – Eastern Shore, 787 F.3d 243 (4th Cir. 2015).**

Question:
Can an employer can be held liable for a hostile work environment created by a co-worker solely because a former employee had previously complained of harassment by the same co-worker when the employer has done a prompt investigation and taken corrective action in the current matter?

Holding:
The court reaffirmed its holding in Paroline v. Unisys Corp. (1989) that employers have an affirmative duty to prevent sexual harassment, and will be liable if they anticipate or reasonably should have anticipated that a particular employee would sexually harass a particular coworker and failed to take action reasonably calculated prevent such harassment. In this case, however, a previous investigation of the alleged harasser by Maryland's civil rights agency has found no cause to believe the harassment had occurred. The court therefore held that as a matter of law, an employer may reasonably rely upon the finding of a state civil rights agency in determining whether an employee poses a risk of creating a hostile work environment.

4. **Pryor v. United Airlines, Inc., 791 F.3d 488 (4th Cir. 2015).**

Question:
Under Title VII, can an employer be held liable for a hostile work environment when the hostile environment is caused by an anonymous person?

Holding:
Although anonymous threats are difficult to investigate, the anonymous nature of severe threats or acts of harassment can heighten what is required of an employer. Here, United's response was neither prompt nor reasonably calculated to end the harassment, the standard for assessing employer liability. A plaintiff in a hostile work environment case does not have to show that taking different measures would have stopped the harassing conduct. Instead, the focus of the inquiry rests on whether the means that an employer chose were "reasonably calculated" to end the harassment. In other words, even if a diligent response may not have been successful, a company is not thereby excused for its lack of diligence.

5. **Bauer v. Lynch, ___ F.3d ___, 2016 WL 105359 (4th Cir. 2016).**

Question:
Can an employer's physical fitness standard require that men and women complete different numbers of push-ups and still comply with Title VII?

Holding:
Because physiological differences between men and women impact their relative abilities to demonstrate the same levels of physical fitness, the answer to the question of whether a given set of physical fitness standards discriminate based on sex depends on whether the standards require men and women to demonstrate different levels of fitness. The Fourth Circuit remanded this case to the trial court to consider whether the facts showed that the FBI's push-up standard required the same level of fitness for both men and women, notwithstanding the requirement that they complete different numbers of push-ups.

6. Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264 (4th Cir. 2015).

Questions:

1. Is a supervisor's use of the term "porch monkey" on two occasions meet the standard for showing a hostile work environment based on race?
2. What is the correct standard for determining whether an employee believes that a hostile work environment is in process when the hostile work environment is based on isolated comments?

Holding:

1. Citing its own decision in Spriggs v. Diamond Auto Glass (2001), the Fourth Circuit held that a supervisor's use of the term "porch monkey" on two occasions met the standard for showing a hostile work environment based on race because although the incident might be viewed as isolated, it is extremely serious.

2. When assessing the reasonableness of an employee's belief that a hostile environment is occurring based on an isolated incident, the focus should be on the severity of the harassment. Because it is extremely serious, an isolated incident that is physically threatening or humiliating is close to the type of repeated conduct that is actionable.

7. Butler v. Drive Automotive Industries of America, __ F.3d __, 2015 WL 4269615 (4th Cir. 2015).

Questions:

1. Under Title VII, can an employee can have multiple employers? [Question of first impression in the 4th Cir.]
2. What test should the courts apply to determine whether an employer's control of an employee is sufficient to joint employer liability under Title VII?

Holding:

1. The court held that an employee can have joint employers for the purposes of Title VII, making the joint employment doctrine the law of the circuit.
2. The court adopted a 9-factor hybrid test, holding, however, that none of these factors are dispositive and that the common-law element of control remains the "principal guidepost" in the analysis. Nevertheless, the court found three factors to be the most important. The first factor – which entity or entities have the power to hire and fire the putative employee – is important to determining ultimate control. The second factor – to what extent the employee is supervised – is useful for determining the day-to-day practical control of the employee. The third factor – where and how the work takes place – is valuable for determining how similar the work functions are compared to those of an ordinary employee.

THE AMERICANS WITH DISABILITIES ACT

8. Reyazuddin v. Montgomery Cty., Maryland, 789 F.3d 407, 416-17 (4th Cir. 2015).

Questions:

1. Under Section 504, what constitutes a reasonable accommodation of a blind call-center employee when the employer upgrades to a newer technology that can only be made accessible at a greater cost?
2. Can an employee bring a disability discrimination claim against a public employer under Title II of the ADA?

Holdings:

1. Employee's accommodation suggestion must be evaluated in light of county budget in its entirety, not only with reference to department budget. Other factors must also be considered including whether other county call centers have provided such accommodations and whether in-house expertise is available to reconfigure the system instead of having to pay for outside consultants.
2. A public employee cannot bring a disability discrimination claim under Title II of the ADA. Employment discrimination claims must be brought under Title I.

9. Gentry v. East West Partners Club Management Co., -- F.3d –, 2016 WL 851673 (2016).

Question:

Is the "mixed-motive" causation standard of Title VII or the "but-for" causation standard of the ADEA the appropriate standard to apply in ADA cases?

Holding:

"But-for" is the proper causation standard for ADA cases. A plaintiff may not establish liability under the ADA by showing that disability was a motivating factor. It must be the sole factor.

THE FAIR LABOR STANDARDS ACT

10. Calderon v. GEICO General Insurance Co., __ F.3d __, 2015 WL 9310544 (4th Cir. 2015).

Questions:

1. Can investigators of factual circumstances ever satisfy the FLSA's administrative duties test?
2. What is the proper measure of damages in an FLSA mistaken classification case?

Holding:

1. The job duties of investigators of factual circumstances do not satisfy the FLSA's administrative duties test because the work is not directly related to the running of the organization.
2. In mistaken FLSA exemption cases where the employer and employee had a mutual understanding that the fixed weekly salary was compensation for all hours worked each workweek, the fluctuating workweek method should be used to calculate back overtime.

Negotiated Resignations

DeWitt F. ("Mac") McCarley, Partner, Parker Poe, Charlotte

Sarah Ford, Partner, Parker Poe, Raleigh

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Public Employment Law Update

May 2016

Negotiated Resignations

DeWitt F. "Mac" McCarley, Esq.

Sarah L. Ford, Esq.

Parker Poe

NEGOTIATED RESIGNATIONS

Public Employment Law Update
UNC School of Government

May 13, 2016

I. INTRODUCTION

A. Definition. A negotiated resignation is a voluntary and informed agreement bargained between an employee and employer in which the employee agrees to resign and release all claims against the employer in exchange for money, benefits, agreements from the employer or other adequate consideration.

B. Relationship to other forms of employment separation.

Voluntary Quit ---- Negotiated Resignation ---- Forced Resignation ---- Fired

C. Appropriate situations for negotiated resignations

"Weak" case for firing (evidence problem, poor documentation, procedural errors, mixed motive, supervisor misconduct . . .)

Risk of negative publicity

Potential lawsuit

Employee unwilling to resign without inducement

D. Inappropriate situations for negotiated resignations

Employee will voluntarily quit

Public incident/public expectation

Some age discrimination cases

E. Goals of parties

1. Employer goals

Separate employee from employment
Prevent future lawsuits
Save money
Avoid adverse publicity

Avoid morale problems
"Get it over with" (quickness and certainty)

2. Employee goals

Financial stability (or avoidance of financial ruin)
Avoid adverse publicity
Protect self-image & reputation – avoid public termination letter
Principle
"Get it over with" (an end to the emotional stress)

3. Unspoken goals (recognize and avoid)

"Pound of flesh"
Revenge
Payback
Politics

II. LEGAL FRAMEWORK

A. Doctrine of employment "at will" in North Carolina

"In order to support a claim for wrongful discharge of an at-will employee, the termination itself must be motivated by an unlawful reason or purpose that is against public policy." Bigelow v. Town of Chapel Hill, 227 N.C. App. 1, 11, 745 S.E.2d 316, 324 (2013); see also Blakeley v. Town of Taylortown, 233 N.C. App. 441, 446, 756 S.E.2d 878, 882 (2014).

B. Bases for wrongful discharge claims (the lawsuits you are trying to avoid . . .)

1. Contract theories: Breach of express contract; breach of implied contract; breach of covenant of good faith and fair dealing; promissory estoppel

2. Tort theories: intentional infliction of emotional distress; outrage; fraud; intentional interference with contract; defamation; invasion of privacy; against public policy

3. Selected state statutes

a. Equal Opportunity and Non-Retaliation for State Employment (G.S. 126-16 and 126-17)
b. Wage and Hour Act (G.S. 95, Article 2A)
c. Retaliatory Employment Discrimination Act (G.S. 95-240)
d. Equal Employment Practice Act (G.S. 143-422.2)[1]

[1] 4/22/2016. North Carolina's recently enacted Public Facilities Privacy & Security Act (HB 2) modified North Carolina's Equal Employment Practices Act to state that it "does not create, and shall not be construed to create or support, a statutory or common law private right of action, and no person may bring any civil action based upon the public policy expressed" therein.

4. Selected federal statutes

    a. Title VII of 1964 Civil Rights Act
    b. Age Discrimination in Employment Act
    c. Family and Medical Leave Act
    d. Americans with Disabilities Act
    e. Fair Labor Standards Act

5. Municipal or County Ordinances

    Due process claims; procedural errors; creation of property right in job

III. GENERAL LEGAL PRINCIPLES FOR NEGOTIATED RESIGNATIONS

A. The resignation arrangement should be memorialized in a legally-enforceable contract typically referred to as a severance agreement.

B. The severance agreement should include a waiver on the part of the departing employee of all legal claims against the employer.

C. Summary of legal requirements for severance agreements:

1. The waiver of claims must be **knowing and voluntary**. The employee must knowingly and voluntarily consent to a waiver in the severance agreement. While the rules and restrictions applicable to waivers depend on the particular statute under which the suit may be brought, most courts will consider the following factors:

    a. whether the agreement was written in a clear, specific, and concise manner such that an average employee would understand it;
    b. whether the agreement was induced by fraud, duress, undue influence, or other improper conduct;
    c. whether the employee had enough time to read and consider the agreement prior to signing;
    d. whether the employee was able to consult an attorney or was encouraged/discouraged to do so prior to signing;
    e. whether the employee could negotiate the terms of the agreement;
    f. whether the employer provided the employee with consideration.

2. The agreement must be supported by **consideration**. The Equal Employment Opportunity Commission (EEOC) takes the position that consideration "must be something of value in addition to any of the employee's existing entitlements." In other words, the payment or provision of benefits an employee would ordinarily be entitled to receive upon termination is inadequate to support a release.

    a. Examples of benefits employees may already be entitled to:

i. Accumulated vacation and holiday time, FLSA compensatory time, reimbursements, accrued but unpaid allowances, continuation or conversion of insurance benefits under COBRA

b. Examples of additional consideration:

i. Money (severance pay), benefits (waive premiums on COBRA insurance), agreements regarding references, payment for outplacement service.

3. The agreement cannot require the employee to waive **future rights**.

4. The agreement cannot waive certain **existing rights**.

D. Releases generally upheld. Fin. Servs. of Raleigh, Inc. v. Barefoot, 163 N.C. App. 387, 594 S.E.2d 37 (2004). Releases are contractual in nature. Scope of the release will be limited to claims or causes of action already in existence at the time of the giving of the release, unless the release specifically includes future claims or existing non-asserted rights.

E. A release is an affirmative defense. (See VF Jeanswear Ltd. P'ship v. Molina, 320 F. Supp. 2d 412, 418-19 (M.D.N.C. 2004) ("When a release is executed in exchange for valuable consideration, the release provides a complete defense to an action for damages.")) Warning: A former employee may seek to introduce a proposed but rejected termination agreement as evidence at trial. In recent years, such efforts have been disfavored. See, e.g., Jeffrey v. Mid-Atlanticare S. LLC, No. 5:11-CV-549-BO, 2012 WL 1555480 (E.D.N.C. Apr. 30, 2012) (excluding evidence regarding proposed separation agreement and severance package); Moore v. Novo Nordisk, Inc., No. CIV.A. 1:10-2182-MBS, 2011 WL 1085650 (D.S.C. Feb. 10, 2011) (Defendant's motion to strike allegations concerning severance package offered to Plaintiff was granted).

IV. GENERAL RESTRICTIONS ON WAIVERS OF LEGAL CLAIMS

A. A severance agreement generally cannot require the employee to waive future rights. The EEOC has issued guidance suggesting that it will find a severance or release agreement invalid if it includes a provision stating that the employee may not apply for work with the employer in the future.

See http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

B. Severance agreements should contain a severability clause to minimize a finding that the entire agreement is unenforceable.

C. As a general matter, entitlements to unemployment compensation, workers' compensation, and vested-rights under benefit plans governed by ERISA cannot be waived.

D. An employee generally may waive his/her right to recover individual payment, but generally may NOT waive his/her right to file a complaint with regulatory agencies or to participate in an investigation conducted by such an agency.

E. Some statutes restrict the applicability of waivers based on the type of claim or the perceived vulnerability of the employee. Selected statutory restrictions are addressed in detail in the next section.

V. STATUTE-SPECIFIC RESTRICTIONS ON WAIVERS OF LEGAL CLAIMS

A. Age Discrimination in Employment Act (ADEA)

1. The ADEA protects employees who are 40 years old or over from age discrimination in the workplace. 29 U.S.C. § 621, et seq.; see also 29 CFR § 1625.22. Potential ADEA claims may be released, but the release must comply with the Older Workers Benefit Protection Act (OWBPA).

2. The basic requirements of an OWBPA release include the following:

a. Any waiver of ADEA rights must be "knowing and voluntary." To be knowing and voluntary under the OWBPA, the waiver must:

i. Be in writing;

ii. Be written in a manner "calculated to be understood by such individual, or by the average individual eligible to participate." In other words, waiver agreements must be drafted in plain language rather than legalese;

iii. Not mislead, exaggerate, omit, or otherwise misstate the benefits or limitations of the agreement;

iv. Specifically refer to rights or claims protected under the ADEA (and reference the ADEA by name);

v. Include an advisement, in writing, that the employee consult an attorney prior to signing the release;

vi. Not attempt to waive any future rights or claims that may arise after the date the waiver is executed. However, this does not bar the enforcement of an employee's agreement to retire or otherwise terminate employment at a future date;

vii. Be given in exchange for consideration. Consideration means anything of value in addition to what an individual is already entitled to receive without the waiver;

viii. Provide an employee, at minimum, with 21 days to consider signing the release. The 21-day period begins to run from the date of the employer's final offer and material changes to the final offer restart the running of the time period;

ix. Provide an employee at least 7 days after signing the agreement to revoke it. This period cannot be shortened.

3. Failure to meet these requirements threatens the viability of the release and exposes the employer to potential liability. It is important to note that these constitute the minimum requirements for a valid age discrimination release. Even if these minimum requirements are met, however, the release may still be invalidated with a showing of fraud, duress, undue influence, or improper employer conduct. In addition, the release may be invalidated if an employer attempts to prohibit the employee from bringing their claim to the EEOC. The OWBPA expressly states that "No waiver agreement may affect the Commission's rights and responsibilities to enforce this Act. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." 29 U.S.C. § 626(f)(4). Thus, any release of claims may not prevent an employee from filing a charge with the EEOC or from participating in an investigation by the EEOC. See 29 U.S.C. § 626(f0(4); 29 CFR § 1625.22(i).

4. More information about claims under the ADEA and OWBPA can be found:

a. Age Discrimination in Employment Act-
http://www.eeoc.gov/laws/statutes/adea.cfm

b. Regulations-
29 CFR 1625, https://www.law.cornell.edu/cfr/text/29/part-1625;
29 CFR 1626, https://www.law.cornell.edu/cfr/text/29/part-1626;
29 CFR 1627, https://www.law.cornell.edu/cfr/text/29/part-1627

c. *See generally* the U.S. Equal Employment Opportunity Commission, Understanding Waivers of Discrimination Claims in Employee Severance Agreements, (last modified July 15, 2009), http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

B. Federal Fair Labor Standards Act (FLSA) and the North Carolina Wage and Hour Act (NCWHA)

1. The FLSA and the NCWHA govern the payment of wages and hour requirements for workers. 29 U.S.C. §§ 201, et seq.; N.C. Gen. Stat.

§§ 95-25.1, et seq. As the Fourth Circuit has noted, "[t]he congressional purpose in passing the FLSA was to protect all covered workers from substandard wages and oppressive working hours. Pursuant to that goal, coverage under the FLSA is construed liberally to apply to the furthest reaches consistent with congressional direction." U.S. Dep't of Labor v. N. Carolina Growers Ass'n, 377 F.3d 345, 350 (4th Cir. 2004) (internal citations and quotations omitted).

2. In the interest of public policy, the protections of the FLSA may not be eliminated by individual agreement or by union contract.

3. North Carolina Federal courts recognize just two ways by which an individual can release or settle a FLSA claim: (1) a Department of Labor-supervised settlement under 29 U.S.C. §216(c), or (2) a court-approved stipulation of settlement. See Taylor v. Progress Energy, Inc., 493 F.3d 454, 460 (4th Cir. 2007) (citing D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 114-16 (1946)). Although the Fourth Circuit has never definitively addressed the factors a court must consider in deciding motions to approve FLSA settlement agreements, the district courts in this circuit have considered the following: "(1) the extent of the discovery that has taken place; (2) the stage of the proceedings, including the complexity, expense and likely duration of the litigation; (3) the absence of fraud or collusion in the settlement; (4) the experience of counsel who have represented the plaintiff; [and] (5) the probability of plaintiff's success on the merits and the amount of the settlement in relation to the potential recovery." Morris v. Cumberland Cty. Hosp. Sys., Inc., No. 5:12-CV-629-F, 2013 WL 6116861, at *3 (E.D.N.C. Nov. 13, 2013) (quoting Howell v. Dolgencorp, Inc., No. 2:09–CV–41, 2011 WL 121912, at *1 (N.D.W.Va. Jan. 13, 2011)). Therefore, a release that does not meet these requirements will be unenforceable.

4. More recently, the restriction on waiving wage and hour claims through general releases has been extended to the NCWHA. In Rehberg v. Flowers Baking Co. of Jamestown, LLC, the United States District Court for the Western District of North Carolina held that "employers in this state should not be able to require their employees to waive wage and hour claims through general releases, either under federal or state law." No. 312CV00596MOCDSC, 2016 WL 626565, at *12 (W.D.N.C. Feb. 16, 2016). The Court further extended their reasoning to prohibit liquidated damages waivers, noting that "such releases violate public policy and the intent of the NCWHA." Id. at *20. This decision has far-reaching implications for employers in North Carolina, who can no longer rely on general releases to prohibit claims under the NCWHA.

5. Practical Advice: Include in the agreement an acknowledgement that the employee has been paid for all hours worked.

6. For general information on the treatment of FLSA claims, see:

a. The Fair Labor Standards Act- http://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

b. Regulations- 29 CFR Chapter V http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

c. The North Carolina Wage and Hour Act- N.C. Gen. Stat. 95-25.1, et seq.- http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_95/GS_95-25.1.html

d. Wage and Hour Division, *Compliance Assistance - Wages and the Fair Labor Standards Act (FLSA),* United States Department of Labor, http://www.dol.gov/whd/flsa/

e. *See generally* the U.S. Equal Employment Opportunity Commission, *Understanding Waivers of Discrimination Claims in Employee Severance Agreements,* (last modified July 15, 2009), http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

C. Family Medical Leave Act (FMLA)

1. The Family Medical Leave Act (FMLA) allows eligible employees to take unpaid, job-protected leave for specified family and medical reasons while continuing to enjoy group health insurance coverage. 29 U.S.C. § 2601, et seq.; see also 29 CFR 825, et seq.

2. The FMLA itself is silent regarding the waiver of claims.

3. Until 2011, the Fourth Circuit Court of Appeals had held that former employees could not waive or release any of their rights under the FMLA without prior approval by the court or the U.S. Department of Labor. See Taylor v. Progress Energy, Inc., 493 F.3d 454, 457-63 (4th Cir. 2007). This ruling treated FMLA claims like FLSA claims. While claims under Title VII and the ADEA may be waived by agreement, under Taylor, FLSA and FMLA claims could not. See id.

4. A split existed between the Fourth and Fifth Circuits on the issue, with the Fourth Circuit finding releases of FMLA claims unenforceable unless approved, and the Fifth Circuit upholding such releases. Compare Taylor, 493 F.3d at 457-63 with Fair v. Williams WPC-I, Inc., 332 F.2d 316, 320-22 (5th Cir. 2003) (holding that the FMLA did not prohibit post-dispute settlement of claims).

5. In 2011, however, the circuit split was resolved in favor of the Fifth Circuit's interpretation. In Whiting v. The John's Hopkins Hosp., 416 F.App'x 312, 316 (4th Cir. 2011), the Fourth Circuit applied the revised

FMLA to hold that waivers of claims based on past FMLA violations are enforceable.

6. Post Whiting, employees who have waived FMLA claims may only bring a lawsuit based on employer conduct that occurred after the waiver was signed.

7. For general information on family and medical leave, please see:

   a. Family and Medical Leave Act
   http://www.dol.gov/whd/regs/statutes/fmla.htm

   b. Regulations- 29 CFR 825
   https://www.law.cornell.edu/cfr/text/29/part-825

   c. Wage and Hour Division, *Family and Medical Leave Act,* United States Department of Labor, http://www.dol.gov/whd/fmla/

   d. Lisa Guerin, *Family and Medical Leave in North Carolina,* NOLO, http://www.nolo.com/legal-encyclopedia/family-medical-leave-north-carolina.html

VI. EFFECT OF NEGOTIATED RESIGNATION ON UNEMPLOYMENT COMPENSATION RIGHTS

A. An employee cannot agree to waive his or her right to unemployment compensation. Waiver of rights is void under G.S. 96-17. "Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this Chapter shall be void."

B. An individual's qualification for benefits under G.S. 96-14.1(c) is determined based on the reason for separation.

   1. "Misconduct" under G.S. 96-14.6 disqualifies a claimant from benefits.

C. Employees who voluntarily resign their employment are not eligible for unemployment compensation.

   1. Is a negotiated resignation a voluntary quit?

      a. Employment Security Commission policy: Voluntariness is generally determined by whether the employee had a choice to remain on the job.

      b. White v. Weyerhaeuser Co., 167 N.C. App. 658, 606 S.E.2d 389 (2005). If an employee resigns his job in the face of an imminent dismissal, then the factfinder may reasonably find that the resignation is involuntary, as it did in this case. It is not, however,

required to do so if it does not believe that the resignation was in fact forced by the employer's termination decision.

D. Practical Advice:

1. In appropriate cases, include enough information in the Stipulated Facts section of a negotiated agreement to show "misconduct" on the part of the employee.

2. Testimony recorded in an unemployment hearing could be utilized in a future lawsuit. In the context of a controversial termination, allowing the employee to collect benefits may be better than contesting the employee's claim and participating in a recorded hearing.

3. Consider offering not to contest the employee's claim for unemployment compensation as additional consideration for the resignation and waiver.

4. Severance payments count towards an employee's entitlement to unemployment compensation. Severance in excess of the allotted unemployment compensation will render the employee ineligible for unemployment compensation.

a. A lump sum severance payment will be deemed the equivalent of a stream of weekly payments for DES purposes. (G.S. 96-14.13)

VII. LOGISTICAL CONSIDERATIONS IN NEGOTIATING A RESIGNATION

A. Negotiating Team: Department Head, Manager, Personnel Director and Attorney.

B. Determine COBRA rights and prepare to provide COBRA paperwork. Exercise caution when contemplating requests to include health benefits as consideration – employer payment of health insurance premiums is likely to violate the Affordable Care Act.

C. Encourage employee to obtain legal advice, so that the end product will be a "voluntary and knowing" agreement and release.

D. If the employee is 40 or older, build enough time into the termination schedule to allow for the 21-day consideration period and 7-day revocation period mandated by the OWBPA.

E. Don't get mad, and don't even think about getting even.

VIII. PROVISIONS IN AN AGREEMENT FOR NEGOTIATED RESIGNATION

A. The following provisions should (usually) be incorporated into a negotiated resignation agreement:

1. A statement of stipulated facts;

2. An agreement of voluntary resignation by the employee (specifying effective date and time);

3. A release of all claims, state and federal, statutory and non-statutory, arising out of the employee's employment;

4. A covenant not to sue;

5. A "safe harbor" provision stating that the release is not intended to waive any claim that cannot be waived;

6. A confidentiality clause (See applicable state statutes: G.S. 160A-168(c), § 153A-98(c), and Article 7, Chapter 126 (§ 126-24));

7. A statement of the consideration flowing from the employer to the resigning employee (money, benefits and other agreements);

8. An agreed method for the employer to respond to requests for job references (this may include agreeing to a specific text for recommendations at the time the negotiated resignation is finalized);

9. An acknowledgement that the employee has been represented and advised by counsel during negotiations (if that is the case) or has been advised to seek counsel;

10. A "no admission of liability" clause.

B. Options for job references:

1. Release only information designated by state statute as public record. G.S. 160A-168(c).

2. Release information designated by state statute as public record and agree on text of an additional written statement (see sample document).

3. Regardless of which approach is taken, a former employee may designate specific information to be made available pursuant to a written release. (See applicable state statutes: G.S. 160A-168(c)(6), § 153A-98(c), and Article 7, Chapter 126 (§ 126-24)).

IX. POST AGREEMENT ISSUES

A. Avoiding defamation claims. The negotiated agreement will release only defamation claims based on conduct which occurred prior to the signing of the agreement, leaving the employer potentially liable for any defamation claims which arise after the agreement is signed. Management must counsel continuing employees not to release information or make comments regarding the resigning employee or the situation.

B. Abiding by terms of the agreement. Management must take steps to insure that the terms of the agreement regarding the handling of reference requests are complied with. This may require putting an "ATTENTION" sheet in the personnel file of the resigning employee (see forms), creating a log sheet for reference requests (see forms), and designating specific management positions authorized to respond to reference requests concerning the resigning employee.

C. Preparing defense materials. Immediately after the negotiated resignation is concluded, all management employees directly involved with the process should write a confidential memorandum to the City/County Attorney relating any actions or statements of the resigning employee, or other information which would be helpful in the defense of a future lawsuit. These memos should begin by referring to the fact that there may be litigation regarding this incident, and the information contained in the memorandum would be useful to the attorney in preparing a defense.

X. SAMPLE DOCUMENTS AND FORMS ATTACHED

A. Agreement to Terminate Employment and Release all Claims
B. Resignation Letter
C. Reference Statement Options
D. Reference Request Log

The suggestions and forms in this presentation are a generalized approach to negotiated resignations and do not substitute for the advice of an attorney in specific situations.

Contact:

Parker Poe Adams & Bernstein LLP

DeWitt F. "Mac" McCarley
704-335-9514
macmccarley@parkerpoe.com

Sarah L. Ford
919-835-4507
sarahford@parkerpoe.com

NEGOTIATED RESIGNATIONS
SAMPLE DOCUMENT A

NORTH CAROLINA

_____ COUNTY

AGREEMENT TO TERMINATE EMPLOYMENT AND RELEASE ALL CLAIMS

THIS AGREEMENT is made this the ____ day of _____, 20___ between the City of _____ (acting through the City Manager) and Joe B. Gone, a resident of _____ County:

WITNESSETH

1. Stipulated Facts

The parties stipulate to the following facts:

(state length of employment, present position and describe event or issue underlying separation)

2. Consideration

The consideration for this Agreement is the sum of money paid to Joe B. Gone by the city, and the mutual agreements and promises between the city and Joe B. Gone contained in this Agreement.

3. Severance Payments to B. Gone

In consideration of the obligations entered into pursuant to this Agreement, City agrees to pay to Joe B. Gone the gross total of _____ thousand dollars ($X,000.00) in the following manner: After the running of the revocation period as described in Paragraph 11, Joe B. Gone shall receive the gross amount of _____, less appropriate withholdings, on each regular payroll date through _____, 20___.

4. Voluntary Resignation

Joe B. Gone agrees to voluntarily resign from employment with City as of 12 noon, _____, 20____ (the "Resignation Date"). City agrees to allow Joe B. Gone to voluntarily resign from employment with the city as of the Resignation Date.

5. Response to Reference Requests

The city agrees to respond to all requests for references from prospective employers by providing only that information which is specified in state law as being a matter of public record

and with a copy of the attached "Reference for Joe B. Gone" which has been agreed upon by Joe B. Gone and the City Manager. Any requests for follow up information will be denied.

[Alternate: The city will respond to all requests for references from prospective employers by providing only that information specified in state law as being a matter of public record. Any request for follow up information will be denied.]

6. Payment of Wages and Accrued Benefits

On the first regular payroll date following the Resignation Date, the city will pay to Joe B. Gone wages earned during the preceding pay period, accrued but unused vacation and holiday pay, and prorated portions of any monthly allowances to which he is entitled.

7. Release of Claims by Joe B. Gone

Mr. B. Gone, intending to be legally bound, and for and in consideration of the payments made and obligations undertaken pursuant to this Agreement, does for himself, his heirs, executors, administrators, successors and assigns hereby remise, release and forever discharge [City], and all its successors, predecessors, subsidiaries, affiliates, assigns, commissioners, directors, officers, board members, trustees, agents, employees and attorneys, insurers, and all persons, corporations or other entities who might be claimed to be jointly and severally liable with it (collectively, "Released Parties"), from any and all actions and causes of action, claims, demands, suits, damages, including back pay, front pay, compensatory damages, punitive damages, employee benefits, wages, bonuses, liquidated damages, attorneys' fees, expenses, and compensation whatsoever, including but not limited to any claims based upon, arising from or relating to his employment relationship with [employer] or the termination of that relationship, and from any and all other claims of any nature whatsoever against the Released Parties, whether known or unknown or whether asserted or unasserted, including but not limited to claims under the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq.; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq.; 42 U.S.C. § 1981; the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.; the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq.; the North Carolina Equal Employment Practices Act, 43 N.C. Gen. Stat. § 143-422.2 et seq.; the North Carolina Retaliatory Employment Discrimination Act, N.C. Gen. Stat. § 95-241 et seq.; the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 75-25.1, et seq.; and the North Carolina Workers' Compensation Act, the North Carolina State Personnel Act, claims for fraudulent misrepresentation, wrongful discharge, whistleblowing, breach of contract, tortious interference with contract, negligent retention and supervision, intentional and negligent infliction of emotional distress, and any other state or federal statutory or common law theories, prior to the date of execution of this Agreement, which he or anyone claiming by, through or under him in any way might have or could claim against any Released Party.

8. Additional Representations

Mr. B. Gone represents and warrants that to the best of his knowledge he properly has been paid for all time worked while he was employed by [employer], that he has received all benefits to which he was entitled and that he knows of no facts indicating and has no reason to believe that his rights under the Fair Labor Standards Act have been violated. Additionally, Mr.

B. Gone represents that as of the date of the execution of this Agreement, he knows of no fact, evidence, and/or information which would lead him to allege a violation of any law by City or any other Released Party.

9. No Interference with Rights

Nothing in this Agreement is intended to waive claims (i) for unemployment or workers' compensation benefits, (ii) for vested rights under ERISA-covered employee benefit plans as applicable on the date [employee] signs this Agreement, (iii) that may arise after [employee] signs this Agreement, or (iv) which cannot be released by private agreement. In addition, nothing in this Agreement including but not limited to the release by [employee], prevent [employee] from filing a charge or complaint with or from participating in an investigation or proceeding conducted by the Equal Employment Opportunity Commission, National Labor Relations Board, the Securities and Exchange Commission, or any other any federal, state, or local agency charged with the enforcement of any laws, or from exercising rights under Section 7 of the NLRA, although by signing this release [employee] is waiving rights to individual relief based on claims asserted in such a charge or complaint, or asserted by any third-party on [employee's] behalf, except where such a waiver of individual relief is prohibited.

10. Other Actions

Mr. B. Gone further agrees that he will not institute any lawsuits or charges either individually or as a class representative or member against any Released Party excepting only any disputes which may arise out of this Agreement. Mr. B. Gone knowingly and intentionally waives any rights to any additional recovery that might be sought on his behalf by any other person, entity, local, state or federal government or agency thereof, including specifically and without limitation the Equal Employment Opportunity Commission, the U.S. Department of Labor, and the North Carolina Department of Labor. Mr. B. Gone promises not to participate in or direct the participation of others in any litigation or charges made by third parties against any Released Party unless legally obligated to do so pursuant to subpoena, court order or applicable law. This "other actions" term is a material, bargained-for term of this Agreement, and its violation in any degree will obligate Mr. B. Gone to forfeit any payments yet to be made and to repay any payments already made. If any Released Party prevails in any legal action for breach of this provision, Mr. B. Gone agrees to pay that party's reasonable attorneys' fees and costs.

11. ADEA Waiver Acknowledgment

Joe B. Gone acknowledges that: (a) he has at least twenty-one (21) days to consider this Agreement; (b) he has read and understands the terms of this Agreement and its effect; (c) he is encouraged to consult with an attorney prior to executing this Agreement; (d) he has signed this Agreement voluntarily and knowingly in exchange for the consideration described herein, which he acknowledges as adequate and more than he is already entitled to receive; (e) this Agreement will become effective seven days after its signature by him (the "Effective Date") and will not be enforceable or effective by City until after that seven-day period has expired; (f) within seven days of signature, Mr. B. Gone may revoke this Agreement by providing written notice of revocation to City Manager at [address] before midnight of the seventh day after the execution date of this Agreement; and (g) no attempted revocation after the expiration of the seven-day period shall have any effect on the terms of this Agreement.

12. Confidentiality of Agreement

Joe B. Gone has not and shall not at any time or in any manner, either directly or indirectly, disclose, divulge, communicate or otherwise reveal or allow to be revealed to any third party any financial term this of Agreement (memorialized in Paragraph 3, supra) to anyone other than his attorney, tax preparer, and spouse, or in response to a lawfully issued and valid subpoena or other process or orders of courts or government agencies, or in response to discovery requests or notices of deposition. To the extent Mr. B. Gone reveals any financial term of this Agreement to his attorneys, tax preparer, or spouse, he agrees to inform them simultaneously of the confidentiality requirements contained herein.

13. Representations Relating to Medicare

Joe B. Gone represents and warrants that he is in the best position to determine if any reimbursement obligation exists, based on his entitlement (or lack thereof) to Medicare Program benefits or his actual receipt of such benefits, and, if there is a reimbursement obligation, to ensure that the Medicare Program's interests are properly considered and discharged. If there is a reimbursement obligation to the Medicare Program, Mr. B. Gone is responsible under the Medicare Secondary Payer ("MSP") statute, 42 U.S.C. §1395y(b), and its accompanying regulations ("the MSP Provisions"), to verify, resolve and satisfy such obligation. Mr. B. Gone expressly represents that he is not eligible for or currently receiving Medicare Program benefits. Mr. B. Gone understands that in making payment to him pursuant to this Agreement, City reasonably is relying on Mr. B. Gone's representation that he is not eligible for or currently receiving Medicare Program benefits or any such similar benefits from a state, county or other municipality.

14. Tax Liability

Mr. B. Gone understands and agrees that to the extent any tax liability may now or hereafter become due because of the payment of sums pursuant to this Agreement, such liability shall be his sole responsibility.

15. No Admission of Liability

This Agreement is not an admission of liability on the part of City for any claim or cause of action, and shall not be interpreted as such.

16. Governing Law

This Agreement shall be governed by and construed in accordance with the laws of the State of North Carolina, excepting only its conflict of law principles.

17. Severability

Each provision of this Agreement is intended to be severable. If any term or provision is held to be invalid, void or unenforceable by a court of competent jurisdiction for any reason whatsoever, such ruling shall not affect the remainder of this Agreement.

18. Entire Agreement

Mr. B. Gone and City agree that this Agreement shall not be subject to any claims of mistake of fact, that it expresses a full and complete settlement, regardless of the adequacy or inadequacy of the payment amount, that it is intended to avoid further dispute and litigation, that it is to be final and complete, and that it may be specifically enforced in court without further instruments or testimony. The parties agree that there is absolutely no agreement or reservation not clearly expressed herein, that the consideration paid herein is all that Mr. B. Gone and his counsel ever are to receive, and that the execution hereof is with the full knowledge that this release covers all possible claims against City, and all other Released Parties.

19. Fees and Costs

Except as otherwise expressly agreed to herein, each party shall bear his/its own attorneys' fees and costs associated with the Action.

20. Counterparts

This Agreement may be executed in counterparts in order to provide each party with a fully-executed original hereof.

21. Binding Effect

This Agreement will be binding upon, inure to the benefit of and be enforceable by any and all successors and assigns of City.

22. Voluntary Execution

The parties, all of whom are represented by counsel, intending to be legally bound, apply their signatures voluntarily and with full understanding of the contents of this Agreement and after having had ample time to consult with counsel and to review and study this Agreement.

This the day and year first written above.

_____

Jane Smith, City Manager

_____

Joe B. Gone

[Add notary statements]

NEGOTIATED RESIGNATIONS
SAMPLE DOCUMENT B

Date

Ms. Jane Smith
City Manager
City Hall

Dear Ms. Smith:

I hereby resign my position as _____ with the City of _____. This resignation is to be effective at 12 noon, _____, 20___.

Sincerely,

Joe B. Gone

Resignation Accepted: _____
Jane Smith, City Manager

Date: _____ Time: _____

NEGOTIATED RESIGNATIONS
SAMPLE DOCUMENT C

OPTION 1

REFERENCE FOR JOE B. GONE

Joe B. Gone was originally employed by the city on June 1, _____. When Mr. Gone resigned on January 9, 20___, he was a Lieutenant in the Police Department, a position he had held for two years and three months prior to January 9.

OPTION 2

REFERENCE FOR JOE B. GONE

Joe B. Gone was originally employed by the city on June 1, _____. When Mr. Gone resigned on January 9, 20___, he was a Lieutenant in the Police Department, a position he had held for two years and three months prior to January 9.

Mr. Gone resigned his position after a female police officer assigned to his shift filed a sexual harassment grievance according to the city personnel policy. The grievance alleged that Lt. Gone knew that the female police officer was the target of sexual jokes on his shift and had refused to counsel or discipline the male officers involved. Further, the female officer alleged that Lt. Gone had, on several occasions, pressured her to see him socially outside of working hours. Lt. Gone denies this allegation and explains that the invitation to go out after work was a general invitation to all of the officers on the shift. His statement is that the after-hours activities were designed to build comradery among the officers on the shift. No further investigation has been conducted into this matter and no grievance hearings have been held.

NEGOTIATED RESIGNATIONS
ATTACHMENT D

LOG SHEET
FOR REFERENCE INFORMATION REQUESTS FROM THE
PERSONNEL FILE OF _____

NAME OF PERSON CALLING	NAME OF COMPANY & ADDRESS	DATE INFORMATION MAILED	WRITTEN OR PHONE FOLLOW-UPS/DATE	HANDLED BY: INITIALS

ATTENTION

ONLY THE CITY MANAGER AND PERSONNEL DIRECTOR ARE AUTHORIZED TO RESPOND TO REFERENCE REQUESTS ON JOE B. GONE.

On January 9, 20____, Joe B. Gone resigned from employment with the city under an Agreement signed by Joe B. Gone, the City Manager, and the Personnel Director. In accordance with that Agreement all requests for references from prospective employers will be responded to by sending a copy of the "Reference for Joe B. Gone" contained in this file.

With the exception of public record information in response for a public records request, NO OTHER INFORMATION, EITHER WRITTEN OR ORAL, WILL BE PROVIDED BY THE CITY TO ANY PROSPECTIVE EMPLOYER OF MR. B. GONE. Any requests for follow up information must be referred to the Personnel Director.

For further information, contact the Personnel Director, the Manager, or the Attorney.

House Bill 2, Public Employers and Bathrooms

Bob Joyce, School of Government

UNC
SCHOOL OF GOVERNMENT

Bob Joyce, UNC School of Government
Public Employment Law Update
May 13, 2016

House Bill 2, Public Employers, and Bathrooms

House Bill 2 is the statute passed in a special, one-day session of the North Carolina General Assembly on March 23, 2016, and signed into law by Governor McCrory that night. It is effective now. This outline focuses on its effects on units of government as employers. To understand what those effects may be, we have to step back and look, very briefly,

- at recent developments in the federal law of discrimination "because of sex"
- at what HB 2 does with respect to employment law
- at the HB 2 bathroom rules, and
- at federal bathroom law developments

The Developing Federal Law on the Meaning of "Because of Sex"

The chief federal statute outlawing employment discrimination is, of course, Title VII of the Civil Rights Act of 1964. From its inception, Title VII has made it unlawful to discriminate in employment on any of these five grounds:

- race
- color
- religion
- national origin, and
- sex

The basic prohibition. The act states the basic prohibition as "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"

What does the statute mean when it outlaws discrimination that is "because of sex?" At the time of the enactment of Title VII, newspapers ran help wanted ads with the labels "Jobs—Male" and "Jobs—Female." The early effect of the law was to outlaw such discrimination based on the status of being male or female. As the law developed, it became clear that, as the courts interpreted it, "because of sex" meant something more than simply the status of being male or female. For example, in 1980, the Equal Employment Opportunity Commission issued

regulations stating that the creation of a hostile or offensive environment because of sexual harassment in the workplace was unlawful discrimination because of sex, and in 1986 in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, the U.S. Supreme Court agreed: "[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."

Expansive interpretations of "because of sex." Three years later, in 1989, the question of the meaning of "because of sex" was before the U.S. Supreme Court again. This time, the Court said that "because of sex" includes because of "sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228. A woman alleged that when she had not been promoted within her employer firm she was told that she needed to "walk more femininely, talk more femininely, [and] dress more femininely" in order to secure the promotion. The Court found that this constituted evidence of sex discrimination as "sex stereotyping." "Because of sex" includes, the Supreme Court said, an "entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

Nine years after that, the Supreme Court (in an opinion by the late Justice Scalia) ruled that the statutory prohibition on discrimination "because of sex" can go far beyond what might have originally been anticipated. *Oncale v. Sundowner Offshore Services*, 523 U.S. 75. The Court held that a male employee could maintain a Title VII action based on sexual harassment toward him by other male employees. Justice Scalia said that while same-sex harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil [they were passed to combat] . . . Title VII prohibits 'discriminat[ion] . . . because of . . . sex.' [This prohibition] . . . must extend to [sex-based] discrimination of any kind that meets the statutory requirements."

Transgender discrimination and "because of sex." In these decisions, the Supreme Court clearly indicated that the term "because of sex" was amenable to an expanded interpretation. But what about discrimination on account of gender identity or gender expression. Can such discrimination be said to be discrimination "because of sex?"

The answer developing in very recent years is Yes. In a 2012 decision, the EEOC said this:

> "When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.' . . . This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person". *Macy v. Dep't of Justice*, Appeal No. 0120120821, 2012 WL 1435995

Other EEOC decisions have followed this reasoning, and the courts are beginning to recognize that disparate treatment of a person because of that person's gender identity or gender

expression can constitute unlawful discrimination "because of sex." One such court decision is from North Carolina in 2015. *Lewis v. HighPoint Regional Health Systems*, 79 F. Supp. 3d 588 (EDNC). An anatomically male individual whose gender identity and gender expression were female was undergoing hormone replacement therapy in preparation for a sexual reassignment surgery. She applied for a job with HighPoint and advanced to a third round of interviews before being turned down. She sued under Title VII, alleging that she was turned down because of her transgender status and that amounted to unlawful discrimination "because of sex." Noting that neither the U.S. Supreme Court nor the federal Fourth Circuit Court of Appeals had ruled on the status of a transgender claim under Title VII, the federal judge held that the plaintiff had stated a claim and allowed the case to go forward.

Who knows where the law on transgender claims under Title VII will ultimately settle, but the current—and very recent—trend is toward a recognition that discrimination because of gender identity or gender expression is discrimination "because of sex."

This trend under the federal law is in direct contrast to the employment law implications of House Bill 2.

HB 2 and Employment Law

House Bill 2 is often referred to as the "bathroom bill" and its bathroom provisions will affect units of government in North Carolina as employers, but several provisions of the bill directly address employment law, separate from the bathroom question.

No state law protection against employment discrimination on account of gender identity or gender expression

HB 2 amends the state's Equal Employment Practices Act to change the Act's list of employment discrimination grounds, found in GS 143-422.2. Before HB 2, the act expressed the public policy of the state that everyone should be free from discrimination in employment on the basis of

- race
- religion
- color
- national origin
- age
- sex, or
- handicap

HB 2 amends this list to change the term "sex" to "biological sex," which it defines to mean the male or female designation on a person's birth certificate. [1] So after HB 2, the list of non-discrimination grounds under the Equal Employment Practices Act is

- race
- religion
- color
- national origin
- age
- biological sex (as shown on a birth certificate), or
- handicap

Before "sex" was changed to "biological sex," there was some argument that the state's Equal Employment Practices Act was meant to establish a policy against discrimination on account of a person's gender identity or gender expression. That is the direction in which federal law is headed, as discussed on pages 1 through 3 above. Now the state's policy of nondiscrimination is limited to "biological sex" as shown on the birth certificate. It is therefore clear that the state law does not prohibit discrimination on account of gender identity or gender expression.

As a consequence, it is not a violation of the state's Equal Employment Practices Act for an employer to discriminate on the grounds of gender identity or gender expression. It may, however, be a violation of federal law.

The end of the wrongful discharge tort based on unlawful discrimination

In 1986 in *Sides v. Duke Hospital*, the North Carolina Court of Appeals for the first time recognized a cause of action that came to be known as the "public policy wrongful discharge tort." In that case, a nurse claimed that Duke University fired her because of her truthful testimony in a medical malpractice case against Duke. She sued in tort for wrongful discharge. Duke responded, saying (among other things) that she was an at-will employee and for that reason could be fired because of her testimony or for any other reason Duke wanted. The Court of Appeals said that it is true that generally speaking an at-will employee can be fired for any reason, but in this case the public policy behind people testifying truthfully in court is so strong that the Court of Appeals was creating a new tort—the *public policy wrongful discharge tort*. If an employer fires an employee for any reason that violates the public policy of the state, the dismissal amounts to the tort of wrongful discharge, and the employee can sue for damages.

GS 143-422.2 has said for decades that "[i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination" on the grounds of race, sex, age, etc. That is a clear statement of public policy. So, the courts for a long time have said that if I am fired because of my race or sex or

[1] In fact, the term "biological sex" is not defined in GS 143-422.2 as amended by HB 2. Instead, HB 2 includes the definition of "biological sex" as "the physical condition of being male or female [as] stated on person's birth certificate" in the parts of the bill concerning bathroom usage. It seems reasonable to "borrow" the definition for use in GS 143-422.2.

age (or other ground in the enumerated list), then I can bring the public policy wrongful discharge tort action. That is, I am suing because of employment discrimination, but I am not bringing an action directly under GS 143-422.2. Rather I am bringing a tort action.

Now, this is where HB 2 kicks in. It amends GS 143-422.2 by adding (among other words) this provision: "[N]o person may bring any civil action based upon the public policy expressed herein." That is, the public policy against employment discrimination expressed in GS 143-422.2 may now no longer be the basis for a public policy wrongful discharge tort lawsuit.

Before HB 2's "no lawsuits" provision was put into place, employees fired because of their race or religion or color or national origin or age or sex or handicap could bring a public policy wrongful discharge tort lawsuit. Now, no such lawsuit can be brought. If I am fired because of my race, I have no right to sue in North Carolina state court under North Carolina state law. I could still seek relief under federal law, but no longer under state law.

No employment discrimination ordinances

HB 2 provides that the Equal Employment Practices Act, as limited by the phrase "biological sex," is the sole source of law on the subject of employment discrimination in North Carolina, and no city or county (or other unit of government) may enact any ordinance or policy dealing with the subject at all.

No minimum wage or overtime ordinances

HB 2 amends the state's Wage and Hour Act (Article 2A of Chapter 95 of the General Statutes), which deals with minimum wage, overtime pay, youth employment and a few other matters. The state's Wage and Hour Act is not a major concern for units of government as employers. As employers, they are exempt from many of its provisions (and they are, by contrast, fully governed by the federal Fair Labor Standards Act, which covers the same subject matter and is a big deal).

Chiefly, the HB 2 amendments provide that the Wage and Hour Act is the sole source of law on its subjects in North Carolina, and no city or county or other unit of local government may enact any ordinance or adopt any policy dealing with the subjects at all.

No employment regulation of contractors

HB 2 amends statutes that relate to the public contracting authority of cities and counties (GS 160A-456 and GS 153A-449). Sometimes cities and counties have required that a contractor, in order to do business with the city, must meet certain employment-related requirements, such as certifying that the contractor does not engage in employment discrimination. HB 2 provides that no city or county may impose "regulations or controls on the contractor's employment practices." No longer may a city, for example, require that in order to bid on a contract a contractor must certify to its policy of nondiscrimination in employment.

This provision of HB 2 has no direct effect on cities or counties or other units of government in their capacities as employers of their own employees.

Applying HB 2 to cities and counties as employers

Under HB 2, cities and counties (and other units of local government) may not enact ordinances or adopt policies regarding employment discrimination by employers in their jurisdiction, and they may not impose any rule related to employment discrimination on businesses who contract with them. They may not enact ordinances or adopt policies regarding minimum wage or overtime requirements for employers in their jurisdiction or businesses who contract with them.

But how does HB 2 affect cities and counties as they enact ordinances or adopt policies dealing with their own employees? That is, how does HB 2 affect cities and counties as employers?

To answer these question, we have to look at the two special provisions regarding cities and counties as employers that are found right in HB 2 itself.

The first special provision. The first one deals with the changes to the Equal Employment Practices Act. HB 2 says that its limitations on employment discrimination provisions—that "sex" means "biological sex" and that no city or county may enact any employment discrimination regulations—do not apply to "such regulations applicable to personnel employed by that body that are not otherwise in conflict with State law."

In my view, this provision says that a city or county may enact an ordinance or adopt a policy regarding employment discrimination with respect to its own employees that is broader than HB 2 allows under the Equal Employment Practices Act as it is amended. That means, it appears to me, that a city or county could enact a personnel ordinance or adopt a personnel policy that would, for example, prohibit discrimination within its own workforce on the grounds of sexual orientation, gender identity, or gender expression. It could not impose such a requirement on employers within its jurisdiction or require it of contractors, but it could impose such a requirement on itself.

Now, the special provision that permits employment discrimination regulations that are "applicable to personnel employed by that body" contains a restriction. It says that such a regulation must not be "otherwise in conflict with State law."

So, would a city's personnel policy banning employment discrimination in its own workforce on account of sexual orientation be "otherwise in conflict with State law"? I think not. It would clearly be in conflict with the Equal Employment Practices Act as amended by HB 2, but this special provision is itself an exception to the Employment Practices Act as amended by HB 2. The phrase "otherwise in conflict with State law" must refer to elements of state law other than the Equal Employment Practices Act.

The second special provision. The second special provision for local governments as employers applies to changes to the Wage and Hour Act. HB 2 says that no city or county may enact any ordinance or adopt any policy dealing with minimum wage or overtime requirements at all. But the special provision says that the prohibition does not apply to "a local government regulating, compensating, or controlling its own employees."

This provision says that a city or county may adopt minimum wage and overtime protections for its own employees that are greater than the law allows. It could not impose such a requirement on employers within its jurisdiction or require it of contractors, but it could impose such a requirement on itself.

HB 2 and the Bathroom Rules

In addition to its employment provisions, HB 2 contains bathroom rules that affect governmental employers.

HB 2 requires all units of government in North Carolina to mark every bathroom that is designed to be used by more than one person at a time as either Male or Female and to require that such bathroom be "only used by persons based on their biological sex." And, as we have seen, that means the sex shown on a person's birth certificate.

The statute appears to permit government employers to have single-person bathrooms that can be used, one person at a time, by individuals of either sex.

Unlike the HB 2 changes to the Equal Employment Practices Act and to the Wage and Hour Act, there are no special provisions regarding a government's own employees. The same rules apply to employees and to the public generally.

Applying the bathroom rules to governmental employers

It would be lawful, it appears, for a governmental employer to have available to its employees only single-person bathrooms. In that case, under HB 2, the employer could designate some as Male and some as Female, and restrict usage accordingly. Or it could designate some or all as "unisex," available, one person at a time, without regard to sex.

The vast majority of governmental employers, however, will already have in place bathrooms designed to be used by more than one person at a time. In that case, HB 2 requires that they be marked Male and Female and that usage be restricted accordingly. I will guess that every governmental employer already does this and that very few have ever encountered an issue.

It is possible, however, for an issue to arise. It would arise when an employee's apparent sex does not match (for whatever reason) the sex with which that employee identifies and wishes to be perceived.

May a governmental employer permit the employee to use the multi-person bathroom of the sex with which the employee identifies? Before diving into that question, let's consider federal law developments over bathroom use and gender identity.

Bathrooms, HB 2, and Federal Law

As we have seen, the federal employment discrimination law with respect to gender identity and gender expression appears to be moving in one direction, and the state employment discrimination law appears to be moving in a different direction. In many instances, that will simply mean that protection will be available under federal law but not under state law. That is, there will not be a conflict; there will simply be federal protection but not state protection.

With respect to bathrooms, however, there may actually be a conflict.

As discussed on pages 1 through 3, the development of the interpretation of Title VII has been toward an understanding that discrimination because of gender identity or gender expression is unlawful discrimination "because of sex." In that context, the issue of bathroom usage has arisen under federal law.

Title VII and OSHA

In a 2015 decision, the EEOC ruled that an employer's restriction on a transgender woman's ability to use a multi-person female restroom facility constituted a violation of Title VII:

> "[W]here, 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." *Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015)

Also in 2015, the Occupational Safety and Health Administration of the U.S. Department of Labor, stating that access to toilets is a health and safety issue for employees, and noting that "employers may not impose unreasonable restrictions on employee use of toilet facilities," said this:

> "[A] person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself." *Best Practices: A Guide to Restroom Access for Transgender Workers*, https://www.osha.gov/Publications/OSHA3795.pdf

Title IX and the Fourth Circuit

The federal law developments with respect to employment discrimination because of gender identity or gender expression are recent. The very most recent development is just one month old—it dates from April of 2016. It is not directly relevant to employment discrimination cases because it did not concern *employment* discrimination. Instead, it concerns a claim of unlawful *educational* discrimination by a transgender school student under Title IX of the Education Amendments of 1972. It is a decision entitled *G.G. v. Gloucester County School Board*, No. 15-2056 (April 19, 2016).

While the decision is not *directly* relevant, however, it is nonetheless likely to prove important for employment discrimination law, for two reasons.

First, it is a decision by the federal court of appeals that has jurisdiction over North Carolina—the federal Fourth Circuit Court of Appeals. The case arose in Virginia, but it has the same affect in North Carolina as if it arose here. Its interpretation of the law is binding on federal district courts in this state.

Second, while the decision does not deal directly with an employment discrimination statute, it does deal with an education discrimination statute with provisions that are directly parallel to Title VII's provisions. There is every reason to suspect that the court's interpretation of Title IX will be highly influential in future interpretations of Title VII.

Title IX and discrimination "on the basis of sex." The basic prohibition of Title IX is this:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."

A student who was assigned the sex of "female" at birth began hormone treatments, legally changed his name to a traditionally male name, and began to live his life as a boy. At his request, school officials took steps to insure that he was treated as a boy. They allowed him to use the boys' restrooms. When complaints came to the school board, the board adopted a new rule that the use of restrooms "shall be limited to the corresponding biological genders."

The student sued, alleging that the failure to allow him to use the boys' restrooms was a form of discrimination against him "on the basis of sex," within the meaning of Title IX. The Fourth Circuit agreed, in effect holding, for purposes of bathroom usage, "on the basis of sex" includes "on the basis of gender identity."

In reaching that conclusion, the court noted that under Title IX there is a regulation providing that a school "may provide separate toilet, locker room, and shower facilities on the basis of sex." The court said:

> "[This regulation] is silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms."

and

> "[This regulation] is susceptible to more than one plausible reading . . . determining maleness or femaleness with reference exclusively to genitalia . . . or with reference to gender identity."

Given that ambiguity, the court said, it would follow the interpretation made by the Office for Civil Rights in the U.S. Department of Education, that gender identity is the proper way to determine maleness and femaleness: "[A] school generally must treat transgender students consistent with their gender identity."

Title VII and "because of sex." As the discussion on pages 1 through 3 of this outline shows, the federal law under Title VII interpreting the prohibition of discrimination "because of sex" is increasingly moving toward including within that prohibition "because of gender identity." This Title IX case interpreting Title IX's prohibition of discrimination "on the basis of sex" as including "on the basis of gender identity" is consistent with that movement and is very likely to reinforce it.

Applying the HB 2 Bathroom Rules in the Workplace

Suppose an employee's apparent sex does not match (for whatever reason) the sex with which that employee identifies.

May the governmental employer permit the employee to use the multi-person bathroom of the sex with which the employee identifies? Under HB 2, the answer is clearly No, unless the sex with which the employee identifies is the same as that indicated on the employee's birth certificate. (There is a question, of course, of how the employer would know what sex is shown an employee's birth certificate. May it simply take the employee's word for it?)

The fact that HB 2 clearly answers the question No may not, however, be the end of the matter. That is because the law of sex discrimination under Title VII of the federal Civil Rights Act of 1964, as interpreted by the Equal Employment Opportunity Commission and to some extent by the courts, is moving to protect individuals from discrimination on account of gender expression or gender identity. This development of the law, as discussed above, is ongoing and uncertain. It is not possible at this point to say that an employer's refusal to allow an employee to use a bathroom other than that of the employee's "biological sex" is a violation of Title VII, but it is extremely likely that test cases will be sought. Where the law will go cannot now be fully predicted.

Understanding Retaliation Claims

J. Travis Hockaday, Partner, Smith Anderson, Raleigh

UNC
SCHOOL OF GOVERNMENT

AVOIDING AMERICA'S NO. 1 EMPLOYMENT CLAIM: RETALIATION

J. Travis Hockaday

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Retaliation is…

Adverse action against persons **because** they **exercised legal rights** (known as protected activity)

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What We Will Cover

- Who is protected
- What are they protected from
- How you can minimize risk
- Risk management checklist

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Who is protected

Individuals who exercise legal rights (known as protected activity)

Examples of protected activity:

- Complaints (discrimination, harassment, pay)
- Accommodation requests
- Leave (FMLA and other legally protected absences)
- Safety concerns
- Workers' comp claims
- Whistleblowing
- Testimony in court and administrative agency proceedings

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What qualifies as an adverse action

All you need is an action sufficient to:

- dissuade reasonable employee/applicant in complainant's situation
- from making/supporting complaint or engaging in protected activity ("materially adverse")

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Focus on what "could well dissuade"

- Not a civility code; not minor annoyances, personality conflicts, snubs, etc.
- But actions with no tangible detriment can qualify – examples?

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Examples of Common Mistakes in Failing to Recognize Adverse Actions

Yes, these qualify:

- Transfers (even if no reduction in pay)
- Suspensions (even if no loss in pay)
- Changes in duties (even if within job description)
- More arduous, strenuous, dirty work

Voluntary correction by employer does not immunize employer from liability – must prevent act from occurring in first place

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Focus on how act viewed by

- reasonable person
  - unusual subjective feelings do not count
- in complainant's situation
- considering all circumstances

Remember: *Same act may be immaterial in some situations, material in others*

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Other facts that will be considered

- Timing
  - Lapses
  - Before and after
- Proof
  - Documentation
  - Comparable treatment

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Action Items

When complaint made . . .

1. Policy affirmation/direction to complainant
2. Supervisor briefing
3. Complainant follow-up
4. Employment action monitoring
5. HR concurrence/employment action

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Employment Action Risk Management Checklist

- Did the employee engage in protected activity?
- How much time has lapsed since the employee exercised these rights?
- Has other adverse action been taken toward them in the interim?

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Employment Action Risk Management Checklist (con't)

- How have similarly situated people not engaging in protected activity been treated?
- What is the organization's general policy/practice with respect to persons who have engaged in the protected activity?
- Has supervision made or tolerated statements that reveal an animus toward persons who have engaged in the protected activity, or a preference for persons who have not?

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Employment Action Risk Management Checklist (con't)

- Do you have evidence to prove that the basis for the adverse action actually occurred?
  - Was documentation prepared at the time of the action?
  - Has the documentation been retained?
  - Does the documentation pass the smell test?
- Have all policies and procedures been followed?
- Is there a legitimate objective business reason for the action?
- Is there anything that might call the organization's reason for the action into question?

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AVOIDING AMERICA'S NO. 1 EMPLOYMENT CLAIM: RETALIATION

J. Travis Hockaday

SMITH ANDERSON

Applying Performance and Conduct Standards Under the ADA

Drake Maynard, Drake Maynard HR Services

UNC
SCHOOL OF GOVERNMENT

THE POST-2009 WORLD:
APPLYING HR BEST PRACTICE PERFORMANCE/ CONDUCT STANDARDS SUCCESSFULLY IN LIGHT OF THE *NEW* ADA

Public Employment Law Update
May 2016

Drake Maynard
HR Services, LLC
919.259.3415 I dmhrservices@gmail.com

Our Context Now

- EEOC guidelines – 2008/2011
- ADA vs. FMLA
- Is everyone disabled?

Essence of EEOC Guidelines

For goodness sake, use some common sense.

Some Examples of the Intersection of P/C and the ADA

- Bad behavior, reprimand, request for accommodation
- Poor performance, low performance rating, disclosure of disability
- Good performance, new disability, inability to perform essential job functions
- Employee with disability, accommodation granted, complaints about "special treatment"

4

The ADA and the FMLA

ADA	FMLA
• Effective from Day One	• Minimum service req'd
• Generally, no end date	• Definite end date
• Reasonable accommodation	• No accommodation – just leave
• **Disability may also be a serious health condition**	• **Serious health condition may also be a disability**

5

Typical ADA Performance Issues

- Pattern absenteeism
- Irregular attendance
- Lack of attention to detail
- Low quantity of work produced

6

How Do You Deal With . . .

Pattern absenteeism?
And
A disability?

7

How Do You Deal With . . .

A lack of attention to detail/low quantity of work produced . . .
And
A disability?

8

How Do You Deal With . . .

Irregular attendance/tardiness. . .

And
A disability?

9

ADA/Behavior Issues

- Employee strikes another employee – when confronted states he is bipolar, under considerable stress
- An employee, who has stated she suffers from depression, but has not asked for an accommodation, begins to behave inappropriately
- Employee found with open container of alcohol in his desk – when confronted states he is an alcoholic

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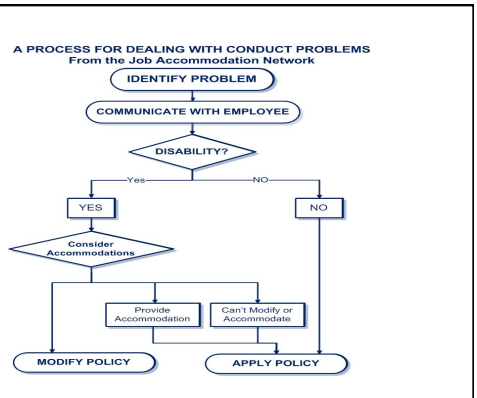
How Do You Deal With . . .

- Behavior of an employee who has stated he/she has a disability?
- Behavior of employee who, when confronted about his/her conduct, states he/she has a disability?

11



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Some Out-of-the-Ordinary ADA Challenges

13

The Flatulent Employee

14

The Obnoxious Jerk Employee

15

The Employee with the "Unknown" Disability

16

Challenges for HR

1. Restraining the compassionate manager
2. Resisting the urge to inquire, *UNLESS . . .*
3. Training managers/supervisors in your agency's process
4. Eliminating mandatory EAP referrals

17

Steps to Help Your Agency and the Employee with a Disability

18

Establish a Process

- Set up a central location for disability questions/requests for accommodation to go to and be handled.
- This supports a uniform approach to the situation of dealing with performance/ conduct issues in an ADA context

19

Inform/Train on Interactive Discussion

Make sure that persons who represent agency in interactive discussions know what the process requires and their responsibilities

20

Train Supervisors and Managers In…

- Your process (where to take questions about disabilities, issues about accommodation)
- How your process makes their (supervisors/ managers) work easier, rather than more difficult
- The importance of engaging in an interactive discussion, rather than making assumptions
- The relationship between the FMLA and the ADA

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The Future Glimpsed, Dimly

- Internet addiction
- Hoarding at the workplace

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Contact Information:

Drake Maynard
DMHRServices, LLC
919-259-3415
dmhrservices@gmail.com

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