UNC
SCHOOL OF GOVERNMENT

PUBLIC EMPLOYMENT LAW UPDATE
MAY 11, 2018

AGENDA

7:45	**Registration Opens**
9:00–9:45	**Pay Equity: Legal and Organizational Reasons Why It's So Important** Diane Juffras and Leisha DeHart-Davis, School of Government
9:45–10:30	**Cyber Attacks and Human Resources: The Experience of Three Counties** ***For Mecklenburg County*:** Tyrone Wade, County Attorney, Stephanie Smith, IT Security Director, Joseph Pilon, HR ***For Davidson County*:** Kathy Cashion, HR Director, Chuck Frye, County Attorney, and Joel Hartley, CIO ***For Catawba County*:** Jodi Stewart, Assistant County Attorney, Rick Pilato, Chief Information Officer
10:30	**Break**
11:00–11:45	**Hot Topics in Title I of the ADA: Employment** William D. Goren, Attorney and Legal Consultant, Decatur, GA
	CONCURRENT SESSIONS
11:45–12:30	**Recent Developments in OSHA Law** John Doyle, Partner, Constangy Brooks, Winston-Salem **GRUMMAN AUDITORIUM**
11:45–12:30	**Hot Topics in Title II of the ADA: Access to Government Facilities and Services** William D. Goren **SUNFLOWER ROOM**
12:30	**Lunch**
1:30–2:15	**Sexual Harassment: Training for Prevention** Howard Kallem, Director of Title IX Compliance, Duke University
2:15–2:30	**You've Got to Follow Your Own Procedures: Tulley v. City of Wilmington** Bob Joyce, School of Government
2:30–2:45	**Break**
2:45–3:30	**Pregnancy: Beyond Title VII to the FMLA and ADA** Bob Joyce
3:30	**Adjourn**

Speaker Biographies

Diane M. Juffras (*Pay Equity*) – Diane is Albert & Gladys Coates Distinguished Term 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 .

Leisha DeHart-Davis (*Pay Equity*) –Leisha DeHart-Davis is a Professor of Public Administration and GovernmentShe directs the Local Government Workplaces Initiative, which conducts organizational research for improving city and county workplaces, and is also a faculty partner in Engaging Women in Local Government, a program that seeks to equip women to pursue public service leadership positions. Her book, *Creating Effective Rules in Public Sector Organizations*, was published by Georgetown University Press in 2017. You can contact Leisha at (919) 966-4189 or at ldehart@sog.unc.edu .

Tyrone Wade (*Cyber Attacks and Human Resources*) –. Tyrone Wade is the Mecklenburg County Attorney. You can contact Tyrone at TyroneC.Wade@Mecklenburgcountync.gov .

Stephanie Smith (*Cyber Attacks and Human Resources*) –. Stephanie Smith is the IT Security Director for Mecklenburg County. You can contact Stephanie at StephanieP.Smith@Mecklenburgcountync.gov .

Joseph Pilon (*Cyber Attacks and Human Resources*) –. Joseph Pilon is Sr. HRMS Business Analyst for Mecklenburg County. You can contact Joseph at Joseph.Pilon@mecklenburgcountync.gov .

Kathy Cashion (*Cyber Attacks and Human Resources*) –. Kathy Cashion is Director of Human Resources for Davidson County. You can contact Kathy at Kathy.Cashion@DavidsonCountyNC.gov .

Chuck Frye (*Cyber Attacks and Human Resources*) –. Chuck Frye is the Davidson County Attorney. You can contact Chuck at Chuck.Frye@DavidsonCountyNC.gov .

Joel Hartley (*Cyber Attacks and Human Resources*) –. Joel Hartley is the Chief Information Officer for Davidson County. You can contact Chuck at Joel.Hartley@DavidsonCountyNC.gov .

Jodi Stewart (*Cyber Attacks and Human Resources*) –. Jodi Stewart is the Assistant County Attorney for Catawba County. You can contact Jodi at jstewart@catawbacountync.gov .

Rick Pilato (*Cyber Attacks and Human Resources*) –. Rick Pilato is the Chief Information Officer for Catawba County. You can contact Rick at rpilato@catawbacountync.gov .

William D. Goren (*Hot Topics in the ADA*) – Attorney Bill Goren provides consulting and training services to the public and private sector organizations and to individuals. He also advises law firms on a wide range of ADA matters. As a deaf person, Bill brings a personal understanding of what it means to have a disability, equipping him with exceptional insight on how the ADA actually works, functioning entirely in the hearing world thanks to hearing aids and lip reading. Bill is the author of *Understanding the Americans with Disabilities Act*, 4th ed. (published by the ABA, 2013) and maintains an active blog on ADA issues, *Understanding the ADA* (www.williamgoren.com/blog/). You can reach Bill at 773-301-3009 or at wgoren@williamgoren.com .

John J. Doyle, Jr. (*Recent Developments in OSHA Law*) – John is a partner in Constangy Brooks's Winston-Salem office, where he specializes in all aspects of labor and employment law with a practice limited to representation of management clients. John is a frequent writer and lecturer on various labor and employment law subjects. He is also an experienced litigator, defending employers in federal and state courts throughout the U.S. and before numerous administrative agencies. John is the first North Carolina Fellow to be inducted into The College of Labor and Employment Lawyers and was recently selected among North Carolina Super Lawyers' Top 100 Attorneys. You can contact John at (336) 721-1001or at jdoyle@constangy.com .

Howard Kallem (*Sexual Harassment*) – Howard Kallem is Assistant Vice President and Director of Title IX Compliance at Duke University. He has over two decades of dealing with sexual harassment issues in higher education. Before joining Duke, Howie was Title IX Coordinator at UNC-Chapel Hill, after spending nearly two decades in the Office for Civil Rights in the U.S. Department of Education, where he specialized in civil rights enforcement and Title IX compliance.You can reach Howie at howard.kallem@duke.edu .

Bob Joyce (*Tully v. City of Wilmington; Pregnancy: Beyond Title VII to the FMLA and ADA*) – 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 .

Pay Equity: Legal and Organizational Reasons Why It's So Important

Public Employment Law Update
May 11, 2018

Diane M. Juffras
School of Government
Leisha DeHart-Davis
School of Government
Local Government Workplaces Initiative

Concepts

Different Perspectives on Pay

Equal Pay, Pay Equity & the Wage Gap

From the Legal Perspective

- Equal Pay
- Pay Equity
- Wage Gap

From the Organizational Perspective

- Equal Pay
- Pay Equity
- Wage Gap

Equal Pay Act of 1963

29 U.S.C. § 206(d)
Prohibition of sex discrimination

(1) **No employer** having employees subject to any provisions of this section **shall discriminate**, within any establishment in which such employees are employed, **between employees on the basis of sex by paying wages to employees** in such establishment **at a rate less than the rate at which he pays wages to employees of the opposite sex** in such establishment **for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions**, **except** where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on **any other factor** other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Equal Pay Act in Summary

- The EPA does not require that an employee show that the employer acted with discriminatory intent.
- Employer faces strict liability unless it proves one of four the affirmative defenses.

EEOC v. Maryland, 879 F.3d 114 (2018)

Employer defense: Used factor other than sex when it used the state's standard salary schedule, which awards credit for prior sate employment or lateral transfer within state employment, and that the comparators had greater experience and qualifications.

Holding: while the standard salary schedule itself was facially-neutral, the employer used its discretion every time it assigned a new hire to a specific step and salary range. To prevail on the affirmative defense, the employer had to show that the job-related distinctions underlying the salary plan, such as prior state employment and preferences for certifications and other evidence of distinction actually motivated it when initially assigning the male comparators to their salary steps.

Rizo v. Youvino, -- F.3d – (9th Cir. 2018)

Employer defense: directed that a new hire's salary is to be determined by taking the person's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. The SOP does not take the new employee's experience into account in determining salary.

Holding: Factor other than sex exception cannot justify setting employees' starting salaries on the basis of their prior pay. Quotes trial court: county policy "necessarily and unavoidably conflicts with the EPA" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk – indeed, here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand."

Equal Pay Act in Summary

"Any factor other than sex" means legitimate, job-related factors such as

- experience
- educational background
- ability
- prior job performance.

Prior salary is <u>not</u> job-related.

Equal Pay Act in Summary

- To prevail on its affirmative defense, an employer submit evidence showing that the reasons it offers to explain the wage disparity **did in fact** cause the disparity.
- It is not enough for the employer to imply that its reasons *could* explain the wage disparity.
  EEOC v. Maryland

Equal Pay Act in Summary

To make prima facie case under EPA, employee need only show that she earned less than at least **one** male comparator performing substantially equal work under similar working conditions – even if other male employees perform substantially identical work and make less money than plaintiffs and even if male comparators were hired at higher step levels, allegedly based on their background experience, relevant professional designations, and licenses or certifications.

Equal Pay Act in Summary

EPA does not require that a female employee demonstrate that males, as a class, are paid higher wages than females, as a class, but only that here is discrimination in pay against a female employee with respect to one male employee.

Lily Ledbetter Fair Pay Act of 2009

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

Issue was the appropriate statute of limitations in a disparate pay/gender discrimination claim brought under **Title VII** when the disparate pay is received within the period allowed by the statute of limitations, but results from intentional discrimination that occurred outside the statute of limitations.

Lily Ledbetter Fair Pay Act of 2009

Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007).

The Supreme Court found that Ledbetter's gender discrimination claim was untimely, holding that the original intentionally discriminatory decision to set her salary level low started the limitations period and that "a new charging period does not commence upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from past discrimination." The court held that Ledbetter could look back no further than the last affirmative decision that affected her compensation in determining whether the employer **intentionally discriminated** against her when it set her salary.

Lily Ledbetter Fair Pay Act of 2009

Amended the statutes of limitations set forth in Title VII of the Civil Rights Act of 1964 to include the following section:

(3)(A) For purposes of this section, **an unlawful employment practice occurs, with respect to discrimination in compensation** in violation of this title, when a discriminatory compensation decision or other practice is **adopted**, when an individual **becomes subject to** a discriminatory compensation decision or other practice, or when an individual **is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid**, resulting in whole or in part from such a decision or other practice. [42 U.S.C. 2000e–5(e)]

EEOC's Strategic Enforcement Plan for 2017-2021

Substantive area priorities:

- Eliminating Barriers in Recruitment and Hiring
- Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination
- Addressing Selected Emerging and Developing Issues
- ***Ensuring Equal Pay Protections for All Workers***
- Preserving Access to the Legal System
- Preventing Systemic Harassment

EEOC's Strategic Enforcement Plan for 2017-2021

4. Ensuring Equal Pay Protections for All Workers

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.

Implications and Predictions

Asking about salary history will be recognized as having a disparate impact on Title VII protected classes.

Implications and Predictions

Renewed interest in the possibilities of large back pay awards under the Lily Ledbetter Fair Pay Act.

More on Pay

- Women and employees of color generally earn less than their white male counterparts
- Gender pay gap has declined, partly due to higher education, experience, and representation of women in public service positions
- Men disproportionately hold authoritative positions
- Jobs with more women pay less (human services, social services)
- Women overrepresented in temp and part-time positions

More on Pay

- Pay is important to public sector employees
- The fairness of pay processes most important
  - Consistent
  - Correctible
  - Transparent
- Performing a pay study with no follow-up damages morale

Pay Effects

Pay Effects

- Employee morale
- Commitment to the organization
- Greater productivity
- Workplace stress
- Less high-performer turnover
- Absenteeism

TWO IMPORTANT EQUAL PAY ACT CASES

1) U.S. Equal Employment Opportunity Commission v. Maryland, 879 F.3d 114 (2018).

Three female employees sued the Maryland Insurance Administration ("MIA") for wage discrimination under the Equal Pay Act.

The MIA followed Maryland's version of the SHRA. Maryland's state personnel system established job categories based on the general nature of required duties and set corresponding levels of compensation using the state's standard salary schedule. Each grade level had an assigned base salary and a specific salary range of 20 separate steps. New hires were assigned to steps within the grade level for the position based on prior work experience, relevant professional designations, and licenses or certifications. The MIA also took into account the difficulty of recruiting for the position and, as required by the state, awards a new employee credit for any prior years of state service.

The plaintiffs and their male comparators were Fraud Investigators who investigated allegations of criminal insurance fraud. They were all assigned to grade level 15, but the male comparators were assigned to higher step levels than the female plaintiffs.

The trial court granted summary judgment to the MIA holding that the plaintiffs had not identified valid male comparators since the men had been initially hired into higher steps than the women and because the disparity in pay between the female and male employees was attributable to their relative experience and qualifications (in other words, "a factor other than sex").

The case came before the Fourth Circuit as an appeal of the grant of summary judgment.

The Fourth Circuit found that the women showed that they did substantially the same work, but were paid less than their male comparators. The women and the male comparators had the same job title and their employer admitted to the court that they all performed "identical jobs." By showing that each claimant earned less than at least one male comparator performing substantially equal work, the plaintiffs satisfied their *prima facie* burden.

MIA asserted that a factor other than gender justified the wage disparity: namely, that MIA used the state's standard salary schedule, which awards credit for prior sate employment or lateral transfer within state employment, and that the comparators had greater experience and qualifications.

The court, however, did not find that MIA had proven its affirmative defense on summary judgment. It found that while the standard salary schedule itself was facially-neutral, MIA used its discretion every time it assigned a new hire to a specific step and salary range. To prevail on the affirmative defense, MIA had to show that the job-related distinctions underlying the salary plan, such as prior state employment and preferences for certifications and other evidence of distinction *actually* motivated MIA when it initially assigned the male comparators to their

salary steps. The court noted that the record on summary judgment did not contain contemporaneous evidence showing that the decision to award the males comparators their respective starting salaries were in fact made pursuant to their allegedly superior qualifications (two were Certified Fraud Examiners and three had previously worked for the state; one had over 20 years of LEO experience, but there was no evidence that this was taken into account in setting that comparator's salary or that it was taken into account in setting the salary of any of the women, all of whom had LEO experience).

2) <u>Rizo v. Youvino</u>, -- F.3d – (9th Cir. 2018).

Aileen Rizo worked for the Fresno County, CA school board as a math consultant. Her initial salary was determined in accordance with the county's hiring schedule, which consisted of 10 stepped salary levels, each containing 10 salary steps. The county's SOP directed that a new hire's salary was to be determined by taking the person's prior salary, adding 5%, and placing the new employee on the corresponding step of the salary schedule. The SOP did not take the new employee's experience into account in determining salary.

Rizo learned that two male math consultants who had been hired after her were hired into higher salary steps. Rizo sued the county under the EPA.

In support of its motion for summary judgment, the county argued that Rizo's salary was based on a factor other than sex, namely her prior salary. The trial court denied the county's motion for summary judgment, concluding that the county's SOP "necessarily and unavoidably conflicts with the EPA" because "a pay structure based exclusively on prior wages is so inherently fraught with the risk – indeed, here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand."

The 9th Circuit, sitting *en banc*, agreed. The court held that the EPA's catch-all exception cannot justify setting employees' starting salaries on the basis of their prior pay. It described its holding as a "general rule" that was not meant to resolve all questions of how it is to be applied such as whether or under what circumstances past salary may play a role in the course of an individualized salary negotiation. This question was left to future cases.

U.S. Equal Employment Opportunity Commission

Equal Pay/Compensation Discrimination

The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. The jobs need not be identical, but they must be substantially equal. Job content (not job titles) determines whether jobs are substantially equal. All forms of pay are covered by this law, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.

An individual alleging a violation of the EPA may go directly to court and is not required to file an EEOC charge beforehand. The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same: within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years. The filing of an EEOC charge under the EPA does not extend the time frame for going to court.

Equal Pay/Compensation and Sex Discrimination

Title VII also makes it illegal to discriminate based on sex in pay and benefits. Therefore, someone who has an Equal Pay Act claim may also have a claim under Title VII.

Other Types of Discrimination

Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement under Title VII, the ADEA, or the ADA that the jobs must be substantially equal.

Employer Coverage

15 or more employees under Title VII and ADA

20 or more employees under ADEA

Virtually all employers under EPA

Time Limits for

Under the EPA, people have two years to go directly to court or to the EEOC

180 days to file a charge under Title VII, ADA and ADEA
(may be extended by state laws)

Federal employees have 45 days to contact an EEO Counselor

For more information, see:

- Facts About Equal Pay/Compensation Discrimination
- Equal Pay Act
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Regulations
- Policy & Guidance
- Statistics

U.S. Equal Employment Opportunity Commission

FACT SHEET

Equal Pay and Compensation Discrimination

The right of employees to be free from discrimination in their compensation is protected under several federal laws, including the following enforced by the U.S. Equal Employment Opportunity Commission: the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990.

The law against compensation discrimination includes all payments made to or on behalf employees as remuneration for employment. All forms of compensation are covered, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.

Equal Pay Act

The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. Each of these factors is summarized below:

- **Skill**
  Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master's degree in physics, since that degree would not be required for the job.

- **Effort**
  The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.

- **Responsibility**
  The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers' personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

- **Working Conditions**
  This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

- **Establishment**
  The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. In some circumstances, physically separate places of business may be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as "affirmative defenses" and it is the employer's burden to prove that they apply.

In correcting a pay differential, no employee's pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased.

Title VII, ADEA, and ADA

Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement that the claimant's job be substantially equal to that of a higher paid person outside the claimant's protected class, nor do these statutes require the claimant to work in the same establishment as a comparator.

Compensation discrimination under Title VII, the ADEA, or the ADA can occur in a variety of forms. For example:

- An employer pays an employee with a disability less than similarly situated employees without disabilities and the employer's explanation (if any) does not satisfactorily account for the differential.
- An employer sets the compensation for jobs predominately held by, for example, women or African-Americans below that suggested by the employer's job evaluation study, while the pay for jobs predominately held by men or whites is consistent with the level suggested by the job evaluation study.
- An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity. For example, if an employer provides extra compensation to employees who are the "head of household," i.e., married with dependents and the primary financial contributor to the household, the practice may have an unlawful disparate impact on women.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on compensation or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII, ADEA, ADA or the Equal Pay Act.

The U.S. Equal Employment Opportunity Commission

QUESTIONS AND ANSWERS: COMPLIANCE MANUAL SECTION ON COMPENSATION DISCRIMINATION

INTRODUCTION

What does this Compliance Manual section address?

This section sets forth the standards governing compensation discrimination under Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), or the Equal Pay Act. Collectively, these statutes require employers to compensate employees without regard to race, color, religion, sex, national origin, age, or disability. They also prohibit retaliation for opposing violations of the statutes or participating in the statutory complaint process.

Why did EEOC issue this Compliance Manual section?

This Compliance Manual section is part of an ongoing EEOC project to update and streamline its Compliance Manual. It replaces the old Compliance Manual sections on compensation issues.

Who can make use of this Compliance Manual section?

This section will be useful to anyone who wants to know what the law requires on the subject of compensation --- employers, employees, advocates, and attorneys. It will also assist EEOC investigators and attorneys in evaluating cases. It contains a detailed Table of Contents to permit users to quickly find relevant information.

The following Questions and Answers summarize the most important points in this section of the Compliance Manual. For further information, we encourage you to refer to the relevant parts of the Compliance Manual section. We have included section numbers to make it easier to find the information that interests you.

Is compensation discrimination really a problem?

Yes. Despite longstanding prohibitions against compensation discrimination under the federal EEO laws, pay disparities persist between workers in various demographic groups. For example, women earn, on average, about 75 cents for every dollar that men earn. Moreover, in two recent studies by the President's Council of Economic Advisers on the gender wage gap, the Council found that after accounting for measurable factors that affect employee compensation, there is still a significant pay gap that could be due to discrimination. EEOC's Internet web site contains statistics on the number of discrimination charges filed and resolved under the EPA.

§10-III Title VII, ADEA, and ADA

What is "compensation"?

Compensation refers to any payments made to or on behalf of employees as remuneration for employment. All forms of compensation are covered, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.

Under what circumstances is compensation discrimination unlawful under Title VII, the ADEA, and the ADA?

Compensation discrimination is unlawful when an employee is paid less because of his or her race, color, religion, sex, national origin, age or disability. The following are examples:

- An employer pays women less than similarly situated men, and the employer's explanation (if any) does not satisfactorily account for the difference.
- An employer sets the pay for jobs predominantly held by Hispanics below that suggested by the employer's job evaluation study, while the pay for jobs predominantly held by non- Hispanics is consistent with the level called for by the job evaluation study.
- A discriminatory compensation system that disadvantaged African-Americans has been discontinued, but salary disparities caused by the system still continue.

How can you tell whether compensation discrimination may be occurring in a workplace?

Of course, there can be an explicit policy or other direct evidence of compensation discrimination. For example, in the past, some employers provided lower pension benefits to women even though the women made the same pension contributions as men. This was held unlawful by the Supreme Court.

Typically, however, discrimination in compensation is more subtle and requires closer examination. The basic approach outlined in the Compliance Manual section is to identify similarly situated employees and compare their compensation. If there are differences, the next step is to determine whether there are nondiscriminatory reasons for the differences. If not, the differences may well be due to discrimination. Even if there appear to be nondiscriminatory reasons, those reasons should be evaluated to determine whether they actually explain the pay differences.

How do you determine whether employees are similarly situated?

The jobs the employees hold should be similar enough that one would expect the jobs to pay the same. This need not be an overly rigid process. The key is what people actually do on the job, not job titles or departmental designations. Skill, effort, responsibility, and the general complexity of the work are guideposts in determining job similarity.

Is it unlawful to discriminate in bonuses, commissions, and other compensation not included in base pay?

Yes. Bonuses, commissions, stock options, and any other payments in addition to base pay must also be provided on a nondiscriminatory basis. It is important to determine whether the employer's policy for providing non-base compensation is nondiscriminatory in design and application. There are two basic issues to consider in determining whether there is discrimination in non-base pay: (1) whether the eligibility criteria for the non-base compensation are applied in a nondiscriminatory way, and (2) whether, among those eligible, employees receive non-base compensation in nondiscriminatory amounts.

What if members of one protected group are lower-paid than others but there is no indication that the pay practices themselves are discriminatory? For example, what if job category A requires less skill, and therefore is lower-paid, and almost all of the employees in job category A are women?

In this situation the mere fact that almost all of the employees in job category A are women does not in and of itself violate the law. But it is important to make sure that the employer does not limit the employment opportunities of women. The focus should be on whether women are hired into job category A and other job categories on a nondiscriminatory basis, and whether women are treated equally in promotions and transfers. In addition, performance appraisals, procedures for assigning work, and training opportunities must be nondiscriminatory. If any of these employer practices are discriminatory, they violate the law in their own right, in addition to affecting employee compensation.

§ 10-IV THE EQUAL PAY ACT

What does the Equal Pay Act require?

The Equal Pay Act requires that equal wages be paid to men and women who perform jobs that require substantially equal skill, effort, and responsibility, and that are performed within the same establishment under similar working conditions.

How similar do jobs have to be under the Equal Pay Act?

Under the Equal Pay Act, jobs must be substantially equal, but not identical. Therefore, minor differences in job duties, or the skill, effort, or responsibility required for the jobs will not render them unequal. Also, differences between the people in the jobs are not relevant to whether the jobs are substantially equal, though differences in qualifications could ultimately be a defense to a claim of pay discrimination.

What does the Equal Pay Act mean by the terms "skill," "effort," "responsibility," and "working conditions"?

"Skill" refers to factors like the experience, ability, education, and training required to perform the job. "Effort" is the amount of physical or mental exertion needed to perform a job. "Responsibility" is the degree of accountability required in performing a job. "Working conditions" refer to the environmental surroundings and physical hazards of the job. Importantly, working conditions of jobs only have to be similar, while the other factors must be substantially equal.

When are pay differentials between men and women lawful under the Equal Pay Act?

The Equal Pay Act permits pay differentials when they are based on a bona fide seniority system, merit system, incentive system (in terms of quality or quantity of production), or any other factor other than sex. These are known as "affirmative defenses" and it is the employer's burden to prove that they apply.

How do you evaluate seniority, merit, and incentive systems?

They must be bona fide systems. This means that the system was not adopted with discriminatory intent; is an established system containing predetermined criteria for measuring seniority, merit, or productivity; has been communicated to employees; and has been consistently and even-handedly applied to employees of both sexes. And of course the system must in fact be the basis for the compensation differential.

What are common "factors other than sex" that can be defenses under the Equal Pay Act?

Examples include employees' job-related education, experience, training, and ability; shift differentials; job classification systems; and market factors. These and other common "factors other than sex" are explained in the Compliance Manual section.

§10-V INTERACTION OF TITLE VII AND EQUAL PAY ACT

How do Title VII and the Equal Pay Act interact?

Both statutes prohibit sex discrimination in compensation. But despite the considerable overlap of the two statutes, they are not identical. Title VII broadly prohibits discriminatory compensation practices, while the Equal Pay Act is more targeted in that it only prohibits sex- based differentials in substantially equal jobs in the same establishment. Therefore, not all compensation practices that violate Title VII also violate the Equal Pay Act. On the other hand, the Commission's longstanding Equal Pay Act guidelines state that a practice that violates the Equal Pay Act also will violate Title VII.

§10-VI RELIEF

If compensation discrimination is found, what is the appropriate relief?

The remedy should include a salary increase and back pay in the amount of the unlawful difference in pay. It is important to keep in mind that compensation discrimination is always remedied by raising the pay of the lower-paid person to match the pay of the higher-paid person. The victims are also entitled to their attorneys' fees and costs, and to

damages that may be available under the particular statute. Injunctive relief also is available.

This page was last modified on December 6, 2000.

 Return to Home Page

Cybercrime
UNC School of Government

May 11, 2018

STRONG

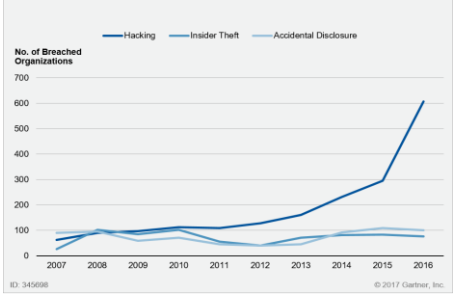
"Accelerating Speed to Strategic Value Utilizing Quarterly Governance"

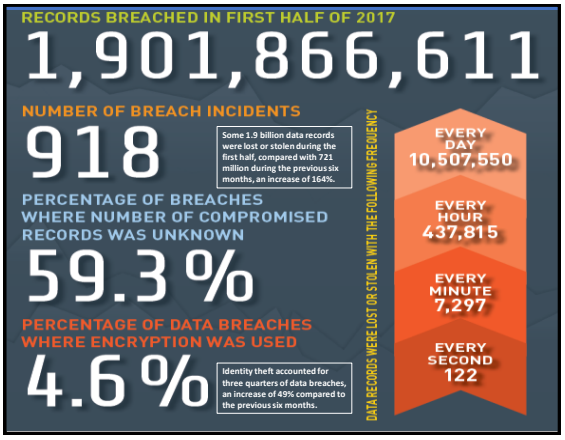
Information Technology Services

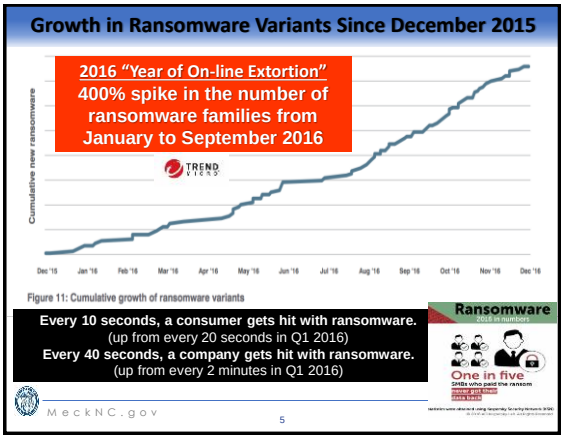
Technology Challenges Facing Government

- Security and Data Breaches
- Insufficient staffing / skill-gap
- Budget constraints
- Lack of IT governance
- Competing project priorities
- Outdated infrastructure
- Aging software systems
- Accountability to citizens
- Slow changes due to bureaucracy
- Lack of reporting and transparency capabilities

Number of Organizations in the U.S. That Suffered a Data Breach







Other 'Costs' of Data Breach

- Reputation damage / negative publicity
- Lost / compromised data
- Lost productivity
- Potential further affects on clients (e.g. identify theft)

MeckNC.gov

The Attack: Mecklenburg County

Mecklenburg County's Ransomware Attack

- Ransomware attack—December 5, 2017
- Mecklenburg County network credentials were compromised by cyber criminal(s) using a social engineering Phishing attack
- The criminal(s) utilized harvested user sign-on credentials to gain un-authorized access to Mecklenburg County systems
- The criminal(s) then planted Ransomware to 'Freeze' select systems and then demanded payment to 'Unfreeze'
- 48 Servers encrypted—Over 200 systems impacted

The Attack: Davidson County

The Attack: Catawba County

The Response: Mecklenburg County

Cyber Incident Response Plan

	Information Technology	Business Owners
Phase 1: Preparation	Facilitate, Make Plans & Be Ready	Be Ready to implement County response/communications plan —timing is everything
Phase 2: Detection	Identify & Respond	From first alert—follow the plan and communicate
Phase 3: Analysis & Validation	Investigative Process for Digital Forensics	Provide information to support Analysis—help prioritize. Identify manual procedures and controls for business continuity.
Phase 4: Containment, Handling & Eradication	Utilizing a Controlled, Methodical, Secure Process	Clean up and restoring services, procedures to support data integrity and internal controls and customer service
Phase 5: Recovery	'New Normal' Standard Operating Practices	'New Normal' Standard Operating Practices, Training, Build Resilience

Preparation & Detection

Phase 1: Preparation | Phase 2: Detection

What preparation did we have?

When did we know this was happening?

What did we do to contain the damage?

Detection and Analysis

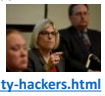
Phase 2: Detection | Phase 3: Analysis & Validation

Backups: Server team stood up a new database environment and we restored database backups for various systems which ran overnight

Gained additional insights from various sources regarding potential risks / benefits of paying ransom, Engaged Experts (Microsoft, FBI, Fortalice, Others)

Based on risk / benefit analysis and input from numerous discussions with County Executive Leadership, decision was made and communicated that:

Mecklenburg County would not pay



https://www.nytimes.com/2017/12/06/us/mecklenburg-county-hackers.html

Containment, Handling, and Restoration

Phase 4: Containment, Handling & Eradication

- Reset all system accounts and passwords
- Tightened 'In-bound' and 'Outbound' Firewall rules

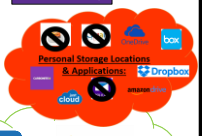
- Executed Restoration Procedures
- Finance: Translate what this means for Financial Operations, act accordingly
- All: communication

https://www.mecknc.gov/news/Pages/Countywide-system-outage.aspx

Identify "New Normal" Security Practices

Phase 5: Recovery

- Implemented extended password length
- Significantly restrict international emails
- Policy & Perimeter Security changes:
  - External email alerting
  - Non-County web-based email elimination
  - Eliminate email auto-forwarding



MeckNC.gov

16

The Response: Davidson County

MeckNC.gov

17

The Response: Catawba County

MeckNC.gov

18

The Effect of the Attack on Human Resources and Payroll

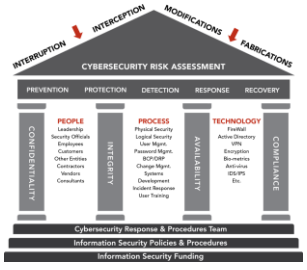
Liability

Vulnerability and Prevention
or
Risk and Risk Management

Developing Risk Management Procedures

- Identify and prioritize risks
- Perform periodic risk assessments
- Develop risk mitigation / contingency plan
- Implement risk mitigation plan
- Monitor progress

IT Governance Structure



IT Governance Area	IT Policy
Access Management	▪ Password Policy
	▪ Email Usage Policy
	▪ Computer and Internet Usage Policy/Acceptable Use Policy
	▪ Social Media Policy
	▪ Acceptable Use Policy
	▪ Remote Access Policy
	▪ Mobile and Personal Device Policy
IT Operations	▪ Portable Storage Policy
	▪ Data Management and Retention Policy
	▪ Data Back-up Policy
	▪ Compliance Policy

Vendor Management

Third-party vendor relationships can create additional risks to your organization. Best practices to manage third-party vendors:

- Conduct third-party screening, onboarding, and due diligence during RFP process
- Establish a tone at the top with management-level oversight
- Ensure appropriate investment and staffing
- Align vendor IT security plan with organization

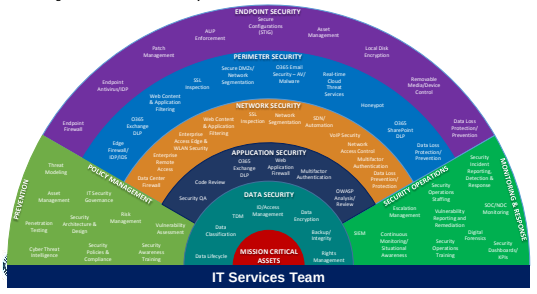
Security Incidents and Reporting

- Security incidents can happen at any time – common examples include:
  - Information is missing or damaged
  - Information is disclosed to an unauthorized individual
  - Equipment is stolen
  - Your computer is infected with a virus
- When possible, write down what you are observing and report as soon as possible
- Important – do not try to investigate or resolve the incident yourself – contact your security liaison or IT department as soon as possible

Implement A Layered Security Approach

Goal: Reduce an Attacker's Chance of Success While Increasing an Attacker's Risk of Detection

IT Security utilizes a layered model to address security concerns across the enterprise. Due to the highly dynamic nature of information security, specific items on this diagram are frequently updated; however, security initiatives should align with one or more of these layers as an area of focus.




GROWTH
TEAMWORK
SUCCESS
HELP!
PARTNER

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Public Employment Update
UNC School of Government
OSHA Developments
May 11, 2018

JOHN DOYLE
CONSTANGY, BROOKS, SMITH & PROPHETE
JDOYLE@CONSTANGY.COM
336-721-6847

What We'll Cover Today

I. OSHA Under the New Administration
II. Much Larger Penalties
III. Mitigating Risk
IV. OSHA Recordkeeping
V. OSHA's New Reporting Requirements
VI. OSHA's Anti-Retaliation Rule
VII. Questions

2

I. OSHA Under the New Administration

3

What We Can Expect

Reduction in the OSHA enforcement Budget – maybe?

Moving from a traditional enforcement focus to stress **both** enforcement and employer compliance assistance

Greater emphasis on Voluntary Protection Program

An end to "regulation by shaming"??

Limited rulemaking

Revisiting some current interpretation letters

Revisiting some recent regulatory changes

4

OSHA Leadership

January 2017 – Dr. David Michaels, the longest serving Assistant Secretary of Labor for OSHA, left the agency to return to teaching at George Washington University.

July 24, 2017 – Loren Sweatt became the Deputy Assistant Secretary (and Acting Assistant Secretary of Labor) for OSHA.

October 27, 2017 – President Trump named Scott Mugno to serve as the next head of OSHA. Mugno is currently the VP for Safety, Sustainability & Vehicle Maintenance at FedEx Ground.

- President Trump resubmitted the nomination in 2018 because the Senate did not confirm the appointment before the legislative term ended in 2017.
- As of April 26, 2018, the Senate had not set a date for Mugno's confirmation vote.

5

Audience Participation Opportunity

John, when you said that we can expect "limited rulemaking" from OSHA, just how much rulemaking are we talking about?

Presidential Executive Order - January 30, 2017

- Reducing Regulation and Controlling Regulatory Costs
- ". . . for every one new regulation issued, at least two prior regulations be identified for elimination, . . ."

The Office of Management and Budget (OMB) reported the progress toward the goals of more effective and less burdensome regulation and includes the following:

1579 Withdrawn or Delayed Actions - "In this Administration, agencies withdrew or delayed 1579 planned regulatory actions, reflecting all such changes from Fall 2016 to Fall 2017."

- **635** regulations were withdrawn from the Unified Agenda
- **244** regulations were made inactive
- **700** regulations were added to the Long Term list
- See https://www.reginfo.gov/public/do/eAgendaMain

6

Regulation by Shaming – Before President Trump's Inauguration (January 20, 2017)

January 18 [Region 5 News Release] - 2017 – 01/18/2017 - Green Bay manufacturer faces more than $219K in proposed penalties after two workers suffer severe injuries within 10 days

January 18 [Region 5 News Release] - 2017 – 01/18/2017 - OSHA cites Ohio railroad parts manufacturer after follow-up inspection finds workers remain exposed to machine, fall hazards . . . faces $235K in proposed penalties

January 17 [Region 2 News Brief] - 2017 – 01/17/2017 - OSHA proposes nearly $89K penalty after finding concrete manufacturer again exposed workers to airborne silica

January 17 [Region 3 News Brief] - 2017 – 01/17/2017 - OSHA fines Pennsylvania hospital $32K for exposing employees to workplace violence, other hazards

January 17 [Region 1 News Release] - 2017 – 01/17/2017 - OSHA: Employee's death at Bellingham auto parts business 'preventable'

January 13 [Region 6 News Release] - 2017 – 01/13/2017 - Oklahoma truck bed manufacturer fined $535K for putting workers at risk, as OSHA inspectors identify 30 safety, health violations

January 12 [Region 5 News Release] - 2017 – 01/12/2017 - Masonry contractor continues to expose workers to fall hazards

- See https://www.osha.gov/pls/oshaweb/owanews_releases.level_subject?p_keyvalue=Enforcement&p_text_version=FALSE&p_status=CURRENT&p_start=0&p_finish=0&p_direction=&p_show=100

7

No Regulation By Shaming – Post-Inauguration

March 28 [Region 4 News Release] **-2017 - 03/28/2017 - Safety Stand-Down events put the brakes on injuries at Georgia road sites**

March 22 [Region 5 News Brief] **- 2017 - 03/22/2017 - OSHA, Operation Engineers, Local 150, renew alliance to train, protect Illinois heavy equipment operators**

March 22 [Region 7 News Brief] **- 2017 - 03/22/2017 - OSHA, Nebraska alliance members to train, protect workers in meat-packing, other industries from common workplace hazards**

March 21 [National News Release] **- 2017 - 03/21/2017 – U.S. Labor Department announces delay in beryllium rule effective date**

March 20 [Region 7 News Brief] **- 2017 - 03/20/2017 - OSHA and Missouri builders, contractors continue alliance to provide outreach, protect workers from common hazards**

March 15 [Region 7 News Release] **- 2017 - 03/15/2017 - OSHA's 'Safe and Sound' campaign assists employers in keeping workplaces safe and healthy**

March 08 [Region 7 News Release] **- 2017 - 03/08/2017 - OSHA urges recovery workers, employers and public to safeguard themselves against hazards in storm cleanup**

March 02 [Region 1 News Release] **- 2017 - 03/02/2017 - Partnership to focus on safety at Amherst College construction project**

March 01 [National News Release] **- 2017 - 03/01/2017 – U.S. Labor Department proposes delay to beryllium rule effective date**

8

Recent Press Releases (April 2018)

04/17/2018 - OSHA Trade Release **- OSHA Flier Offers Steps to Keep Tractor Trailer Drivers Safe at Destination**

04/17/2018 - Region 7 OSHA News Release **- U.S. Department of Labor Cites Nebraska Company For Exposing Employees to Trenching Hazards**

04/17/2018 - Region 8 OSHA News Release **- U.S. Department of Labor Cites Contractor for Exposing Workers to Trenching, Other Safety Hazards on North Dakota Municipal Project**

04/13/2018 - Region 5 OSHA News Release **- U.S. Department of Labor Finds Ohio Contractor Continues To Expose Roofers to Falls and Other Safety Hazards**

04/12/2018 - Region 2 OSHA News Release **- U.S. Department of Labor Cites New Jersey Plastics Manufacturer For Workplace Safety Failures, Proposes Penalties of $435,679**

04/11/2018 - Region 4 OSHA News Release **- U.S. Department of Labor Partners with Landscape Industry Associations and Employers to Sponsor Southeast Safety Stand-Down Events Focusing on Preventing Heat-Related Illnesses and Landscaping Injuries**

04/09/2018 - Region 1 OSHA News Release **- Lynnway Auto Auction to Correct Hazards, Implement Safety Measures, And Pay Penalties in U.S. Department of Labor Settlement**

04/06/2018 - Region 4 OSHA News Release **- U.S. Department of Labor Seeks to Prevent Georgia Roadway Worksite Injuries Through Safety Stand-Down Events**

04/05/2018 - Region 7 OSHA News Release **- Grain-Handling Industry and Safety Professionals Announce 'Stand-Up for Grain Engulfment Prevention Week,' April 9-13**

04/03/2018 - Region 7 OSHA News Release **- U.S. Department of Labor Cites Omaha Company for Exposing Workers To Trenching Hazards, Proposes $38,061 in Penalties**

9

Walk-Around Inspections - Revisited

In a February 21, 2013 OSHA Interpretation Letter, the Agency said that a union official could stand in as the employee representative during an OSHA inspection even where the facility has no collective bargaining agreement.

September 2016, a lawsuit was filed by the National Federation of Independent Businesses in the federal District Court in Texas challenging this Interpretation.

April 25, 2017 – OSHA issued a Memo to its Regional Administrators withdrawing its 2013 Interpretation and said that the employee representative must generally be an employee of the employer unless a CSHO determines that a 3rd party is necessary for the inspection.

10

II. Much Larger Penalties

11

New OSHA Penalties

The Federal Civil Penalties Inflation Adjustment Act of 1990 exempted OSHA from having to periodically increase penalties to account for inflation.

November 2, 2015 – Bipartisan Budget Act of 2015 - required OSHA to increase its maximum penalties for the first time since 1990.

NOTE: Section 17 of the OSH Act specifies:

- (a) Any employer who willfully or repeatedly violates the requirements of section 5 of this Act . . . may be assessed a civil penalty of not more than $70,000 for each violation, but not less than $5,000 for each willful violation.
- (b) Any employer who has received a citation for a serious violation of the requirements of section 5 of this Act . . . shall be assessed a civil penalty of up to $7,000 for each such violation.

12

New OSHA Penalties (continued)

OSHA's new maximum fines apply to all citations issued after August 1, 2016.

Penalty amounts adjusted for inflation as of January 2, 2018:

- Serious -- $7,000 ⟹ $12,934
- Willful/Repeat -- $70,000 ⟹ $129,336
- Failure to Abate -- $7,000 ⟹ $12,934

Since August 1, 2016 the average initial penalty for all companies for a serious violation is $5,087, up from $3,285. For companies with more than 250 employees, the average went to $10,065.

- See, Bloomberg BNA Occupational Safety and Health Reporter, 3/9/17.

Note: State plan states – OSHA has taken position that State plans must increase their maximum and minimum penalties to be at least as high as OSHA's

13

Audience Participation Opportunity

John, we get the increased penalties story.

So, what things can we do to help mitigate our risk of OSHA citations?

You always give us such practical ideas on how to reduce our exposure.

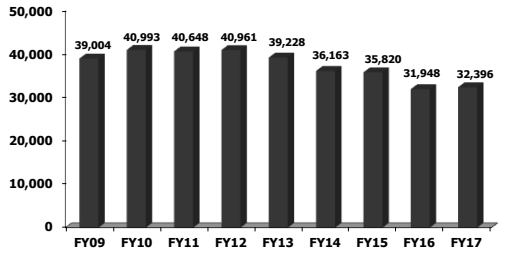
Just saying.

14

III. Mitigating Risk

15

Federal OSHA Inspections



16

OSHA Notice of Contest Rates

The Notice of Contest Rate has been 10.6% since OSHA indicated the penalty increase – it was 7.5% prior to the increase.

- Occupational Safety & Health Reporter (BNA), 3/9/17

17

18

For Fiscal Year 2017

Fall Protection – General Requirements (1926.501): 6,072 violations
Hazard Communication (1910.1200): 4,176
Scaffolding (1926.451): 3,288
Respiratory Protection (1910.134): 3,097
Lockout/Tagout (1910.147): 2,877
Ladders (1926.1053): 2,241
Powered Industrial Trucks (1910.178): 2,162
Machine Guarding (1910.212): 1,933
Fall Protection – Training Requirements: 1,523
Electrical – Wiring Methods (1910.305): 1,405

19

Be Sensitive To:

- Blocked exits
- Unlabeled secondary containers
- Stacking issues
- Blocked electrical panels, missing "knockouts," missing ground prongs
- Lack of appropriate PPE
- Forklift inspections, seat belts

20

Complaint-Based Inspections

Over 25% of all OSHA inspections are complaint based.

OSHA allows complaints to be filed on-line.

The GAO determined that the OSHA inspection rate at establishments that experienced labor unrest was 6.5 times higher than at establishments that did not experience such unrest.

- **See**, *www.gao.gov/archive/2000/he00144.pdf*

How comfortable are your employees in raising complaints internally?

21

Preventing Repeat Violations

Repeat violation = when a new citation is issued to an employer who has been previously cited for a substantially similar condition within the last 5 years (was 3 years until April 2010).

- NOTE: Effective January 1, 2017 – **California** adopted a 5-year look-back for Repeat violations.

On February 14, 2018, the 2nd Circuit of Appeals determined that there are no statutory limits on the length of time that a prior citation can be used as a basis for a repeat violation.

- See Triumph Construction Corp. v. Secretary of Labor, 2nd Cir. (Feb. 14, 2018).

Repeat citation prevention:

- **Review past citations and ensure that all cited items have been abated and have remained abated.**
- **See, ,** http://www.osha.gov/pls/imis/establishment.html
- **Examine other equipment and other facilities.**

22

Willful and Repeat Violations

YEAR	FY10	FY11	FY12	FY13	FY14	FY15	FY16
Willful	1,519	594	423	319	439	527	524
Repeat	2,758	3,229	3,034	3,139	2,966	3,088	3,146

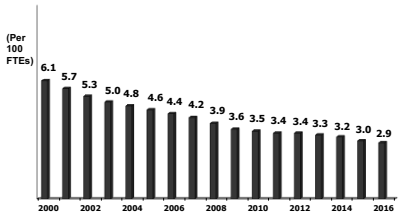
NOTE: Willful/Repeat - $70,000 ⟹ $129,336

23

IV. OSHA Recordkeeping

24

OSHA Recordkeeping – Injury and Illness Rates*



*BLS: 11/9/17 https://www.bls.gov/news.release/osh.nr0.htm

25

OSHA Recordkeeping

Annually Audit OSHA Logs.

OSHA 300A Summary of Injuries and Illnesses Form

- "I certify that I have examined this document and that to the best of my knowledge the entries are true, accurate, and complete." Post Logs from **February 1 through April 30**.

October 19, 2015, OSHA Interpretation Letter

- Employee cuts finger and gets Band-Aid® from co-worker. Co-worker sees small amount of blood and faints. Must record loss of consciousness.

September 9, 2016, OSHA Interpretation Letter

- Exercise that is part of safe work practices commonly recommended for anyone engaged in certain tasks – not considered medical treatment. If exercise is recommended to an employee after the employee exhibits symptoms of a work-related injury, the exercise is considered medical treatment.

December 21, 2017, OSHA Interpretation Letter

- Cold compression therapy - "cold compression therapy devices . . . constitute medical treatment beyond first aid."

26

V. OSHA's New Reporting Requirements

27

New Reporting Requirements

Old Rule: 8 hours to report all work-related fatalities and in-patient hospitalizations of 3 or more employees.

New Rules: Employers must report:

- All work-related fatalities (**8 hours to report**)

24 Hours to Report

- All work-related in-patient hospitalizations of one or more employees for "care or treatment"
- All work-related amputations
- All work-related eye loss

Note: These new rules went into effect in January 2015.

28

New Reporting Requirements (continued)

NOTE: The new rules apply to any in-patient hospitalization, amputation, or eye loss that occurs within 24 hours of a work-related incident, and to any fatality that occurs within 30 days of a work-related incident.

29

New Reporting Requirements (continued)

Amputations: 1904.39(b)(11): ". . . the traumatic loss of a limb or other external body part . . . that has been severed, cut off, amputated (either completely or partially); fingertip amputations with or without bone loss; medical amputations resulting from irreparable damage; amputations of body parts that have since been reattached. Amputations do not include avulsions, enucleations, deglovings, scalpings, severed ears, or broken or chipped teeth."

- **NOTE:** 11/12/15, OSHA Interpretation Letter – work-related chipped teeth are recordable but are only reportable if they result in in-patient hospitalization. They are not "amputations."

30

New Reporting Requirements (continued)

Loss of Eye: The "physical removal of the eye, including enucleation and evisceration," are reportable as loss of an eye. The "loss of sight without the removal of the eye is not reportable." If, however, the employee is hospitalized for the loss of sight, it is reportable.

31

Rapid Response Investigation ("RRI")

OSHA responds to about 1/3 of the reports with an on-site inspection, and responds to about 2/3 of the reports by requesting a Rapid Response Investigation.

RRI is by Phone/Fax Process

OSHA requests that the employer investigate and submit an incident report that includes:

- Root Cause(s)
- Corrective Actions
- Employee Statements
- Signed Abatement Verification

OSHA will not use the employer's internal investigation to cite a condition(s) **provided** that "employees are not exposed to a serious hazard and the employer is taking diligent steps to correct the condition."

32

New Electronic Reporting Rules

Establishments with 250 or more employees must submit information from their 2016 Form 300A by December 31, 2017.

- These same employers will be required to submit information from all 2017 forms (300A, 300, and 301) by July 1, 2018.
- Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

Establishments with 20-249 employees in certain high hazard industries must submit information from their 2016 Form 300A by December 1, 2017.

- These employers must submit their 2017 Form 300A by July 1, 2018.
- Beginning in 2019 and every year thereafter, the information must be submitted by March 2.

See, https://www.osha.gov/news/newsreleases/trade/12182017

33

Audience Participation Opportunity

John, what happens if an employer did not submit their report on time?

About 150,000 worksites may have failed to comply with the electronic filing requirement according to Agency figures provided to Bloomberg Environment. See BNA OS&H Reporter 3/15/18

According to an OSHA memo to its Regional Administrators dated February 21, 2018:

- If the employer failed to submit, but provides a paper copy of the records during an OSHA inspection, an Other Than Serious citation will be issued with no penalty.
- If the employer failed to submit its 2016 data, but shows that it has already submitted its CY 2017 data, an Other Than Serious citation will be issued with no penalty.
- If the employer failed to submit its records and does not produce the records, an Other Than Serious citation will be issued with appropriate penalty.
  - Note: up to $12,934; Six month period to issue a citation will be until June 15,2018.

34

Audience Participation Opportunity

So, John, I'm assuming that at this point, the new electronic reporting rule is good to go – it's a done deal. Right?

The **OSHA Website** currently (as of 4/19/18) reads:

Employers can now begin to electronically report their Calendar Year (CY) 2017 Form 300A data to OSHA. All covered establishments must submit the information by July 1, 2018.

Covered establishments with 250 or more employees are only required to provide their 2017 Form 300A summary data. ***OSHA is not accepting Form 300 and 301 information at this time***. OSHA announced that it will issue a notice of proposed rulemaking (NPRM) to reconsider, revise, or remove provisions of the "Improve Tracking of Workplace Injuries and Illnesses" final rule, including the collection of the Forms 300/301 data. The Agency is currently drafting that NPRM and will seek comment on those provisions.

- See, https://www.osha.gov/injuryreporting/index.html

35

OSHA Recordkeeping - 5 Year Rule Overturned

Background: In 2012, a Federal Appeals court ruled that the statute of limitations for issuing recordkeeping violations is six months following the violation – OSHA argued that it was 5 years. Volks v. Sec. of Labor, (D.C. Cir. 2012).

December 16, 2016 – OSHA issued amendments to the recordkeeping rule – effective January 18, 2017. The new rule revised 1904.29(b)(3) of the OSHA Recordkeeping Regulation to say that the obligation to record cases is a continuing obligation that continues through the 5-year retention period of 1904.33.

CRA – On March 22, 2017, Congress voted to repeal the amended recordkeeping rule under the CRA. The resolution was signed into law by President Trump on April 4, 2017.

36

VI. OSHA's Anti-Retaliation Rule

37

Discrimination/Anti-Retaliation Rule

§1904.35(b)(1) Employee Involvement

- (i) You must establish a reasonable procedure for employees to report work-related injuries and illnesses. A procedure is not reasonable if it would deter or discourage a reasonable employee from accurately reporting a workplace injury or illness;
- (ii) You must inform each employee of your procedure;
- (iii) You must inform each employee of:
  - (A) The right to report work-related injuries and illnesses; and
  - (B) The prohibition against discharging or in any manner discriminating against employees based on reporting; and
- (iv) You must not discharge or in any manner discriminate against any employee for reporting a work-related injury or illness.

(**This rule affects the topics of Discipline, Drug Testing, and Incentive Programs.)**

See, Oct. 19, 2016, Memorandum of Interpretation from OSHA Deputy Assistant Secretary. https://www.osha.gov/recordkeeping/finalrule/interp_recordkeeping_101816.html

38

Discipline as a Result of Injuries

Do not:

- Have a policy that disciplines all employees who are injured at work regardless of fault;
- Discipline only employees who report an injury for violation of safety rules;
  - Employers should monitor for compliance with safety rules absent injuries.
- Utilize vague rules that will be perceived as a pretext for unlawful discrimination (e.g., bee sting is reported – discipline for "failure to work carefully").

See, https://www.osha.gov/recordkeeping/modernization_guidance.html

39

Post Accident Drug Testing

Post accident drug tests okay if there is a reasonable possibility that employee drug use could have contributed to the injury.

- **See,** https://www.osha.gov/recordkeeping/modernization_guidance.html

OSHA Guidance (released Dec. 15, 2016):

- Drug test after reporting CTS or bee sting – **NO**
- Drug test after employee was injured upon inadvertently driving forklift into stationary equipment. **YES**
- Post accident drug tests of all injured employees in order to get a premium reduction under state DFWA programs (or because private insurance carrier provides discounted rates). **YES**

NOTE: A new OSHA administration might issue a different interpretation.

40

Incentive Programs

OSHA Guidance: https://www.osha.gov/recordkeeping/modernization_guidance.html

Employers must not use incentive programs to penalize employees for reporting work-related injuries and illnesses.

- Cancelling a "substantial cash prize drawing" for a group of employees because one employee reports an injury. **NO**
- Cancelling a "substantial cash prize drawing" for a group of employees because one employee failed to comply with applicable safety rules. **YES**
- Cancelling a "substantial cash prize drawing" for a group of employees because one employee failed to comply with applicable safety rules and was injured; employees seldom complied with safety rules – prize only cancelled when injury reported. **NO**
- Cancelling party because one employee failed to complete safety training course. **YES**

41

Incentive Programs (continued)

Consider "positive" incentive programs

- Recommending safety improvements
- Promoting employee participation in safety-related activities
  - For example, if everyone wears their hearing protection . . .
- Identifying hazards
- Participating in investigations of injuries or near misses
- Serving on safety committees

42

VIII. QUESTIONS???

43

ADA Hot Issues Title I and Title II

William D. Goren, Esq., Decatur, GA

773-301-3009
wgoren@willliamgoren.com
www.williamgoren.com/blog

1

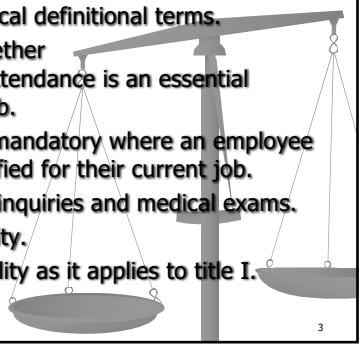
Session Objectives

- Identify hot issues in title 1 and title II of the ADA.
- Discuss the underlying legal principles of those hot issues.
- Have an interactive dialogue so as to enable everyone to have a better understanding of how to deal with these issues when they arise.

2

What You Will Find in Title I Slides

- Discussion of critical definitional terms.
- Discussion of whether telecommuting/attendance is an essential function of the job.
- Is reassignment mandatory where an employee is no longer qualified for their current job.
- Disability related inquiries and medical exams.
- Chemical sensitivity.
- Website accessibility as it applies to title I.



3

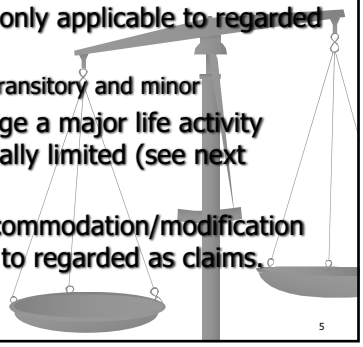
Definition of Disability

- A physical or mental impairment that substantially limits one or more major life activities;
- A record of such an impairment;
- Is regarded as having such an impairment.

4

Three Points About Regarded As

- Six month rule only applicable to regarded as claims.
  - Must be both transitory and minor
- No need to allege a major life activity being substantially limited (see next slides).
- Reasonable accommodation/modification does not apply to regarded as claims.

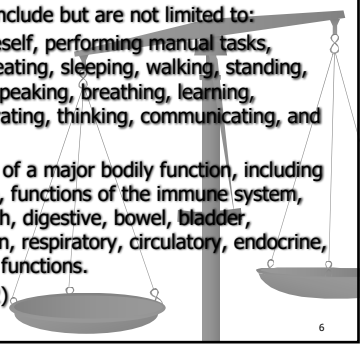


5

Major Life Activities

- Major life activities include but are not limited to:
  - (1) caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
  - (2) the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

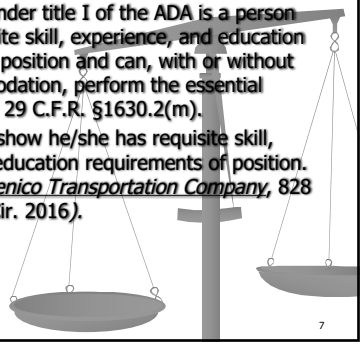
  42 U.S.C. §12102(2)



6

Qualified/Otherwise Qualified title I (Employment)

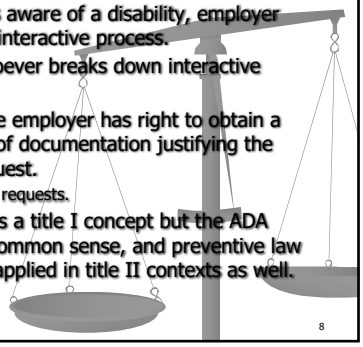
- A qualified person under title I of the ADA is a person satisfying the requisite skill, experience, and education requirements of the position and can, with or without reasonable accommodation, perform the essential functions of the job. 29 C.F.R. §1630.2(m).
  - Up to plaintiff to show he/she has requisite skill, experience, and education requirements of position. *Kilcrease v. Domenico Transportation Company*, 828 F.3d 1214 (10th Cir. 2016).



7

Interactive Process

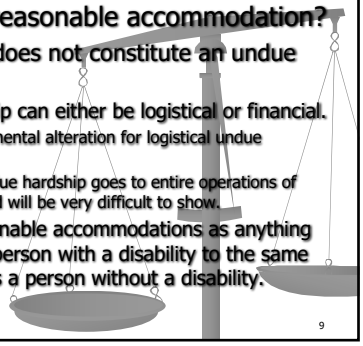
- Once an employer is aware of a disability, employer must engage in the interactive process.
  - Liability is on whoever breaks down interactive process.
- In title I matters, the employer has right to obtain a reasonable amount of documentation justifying the accommodation request.
  - Includes service dog requests.
- Interactive process is a title I concept but the ADA scheme, case law, common sense, and preventive law **demand** that it be applied in title II contexts as well.



8

Reasonable Accommodations

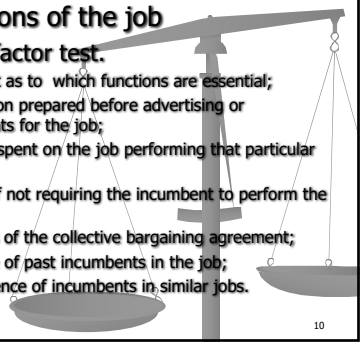
- Just what is a reasonable accommodation?
  - Anything that does not constitute an undue hardship.
    - Undue hardship can either be logistical or financial.
      - Think fundamental alteration for logistical undue hardship.
      - Financial undue hardship goes to entire operations of employer and will be very difficult to show.
    - Think of reasonable accommodations as anything that gets the person with a disability to the same starting line as a person without a disability.



9

Essential Functions of the Job EEOC Approach

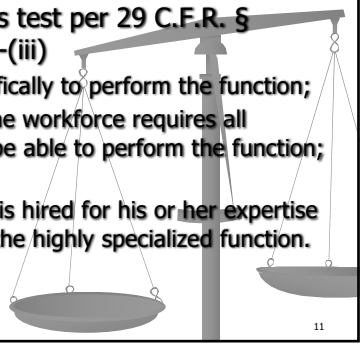
- Essential functions of the job
  - EEOC's seven factor test.
  - Employer's judgment as to which functions are essential;
  - Written job description prepared before advertising or interviewing applicants for the job;
  - The amount of time spent on the job performing that particular function;
  - The consequences of not requiring the incumbent to perform the function;
  - Any applicable terms of the collective bargaining agreement;
  - The work experience of past incumbents in the job;
  - Current work experience of incumbents in similar jobs.



10

Essential Functions of the Job EEOC Approach Continued

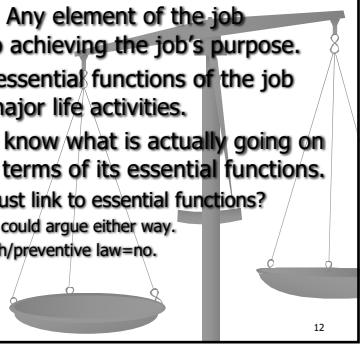
- Three situations test per 29 C.F.R. § 1630.2(n)(2)(i)-(iii)
  - Job exist specifically to perform the function;
  - Small size of the workforce requires all employees to be able to perform the function; or
  - The employee is hired for his or her expertise in performing the highly specialized function.



11

Essential Functions of the Job Continued: Keeping it Simple

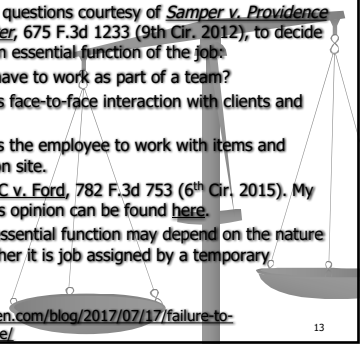
- Keep it simple: Any element of the job fundamental to achieving the job's purpose.
- Don't confuse essential functions of the job with tasks or major life activities.
- Make sure you know what is actually going on with the job in terms of its essential functions.
  - Service dog must link to essential functions?
    - Under title I, could argue either way.
    - Best approach/preventive law=no.



12

Telecommuting/Attendance an Essential Function of the Job?

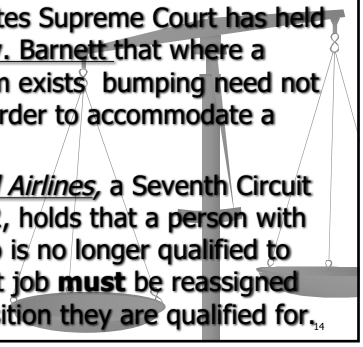
- Ask yourself these three questions courtesy of *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), to decide whether attendance is an essential function of the job:
  - Does the employee have to work as part of a team?
  - Does the job requires face-to-face interaction with clients and other employees, or
  - Does the job requires the employee to work with items and equipment that are on site.
- Also read this case, EEOC v. Ford, 782 F.3d 753 (6th Cir. 2015). My blog entry discussing this opinion can be found here.
- Also, attendance as an essential function may depend on the nature of the job, such as whether it is job assigned by a temporary staffing agency.
  - See this blog entry: http://www.williamgoren.com/blog/2017/07/17/failure-to-accommodate-employee/



13

Is Reassignment Mandatory?

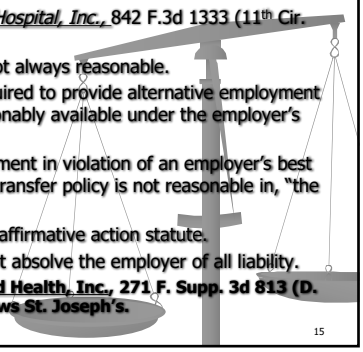
- The United States Supreme Court has held in US Airways v. Barnett that where a seniority system exists bumping need not be allowed in order to accommodate a disability.
- *EEOC v. United Airlines*, a Seventh Circuit case from 2012, holds that a person with a disability who is no longer qualified to do their current job **must** be reassigned to a vacant position they are qualified for.



14

11th Circuit Contra to 7th Circuit

- *EEOC v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016).
  - Reassignment is not always reasonable.
  - Employer only required to provide alternative employment opportunities reasonably available under the employer's existing policies.
  - Requiring reassignment in violation of an employer's best qualified hiring or transfer policy is not reasonable in, "the run of cases."
  - The ADA is not an affirmative action statute.
  - Good faith does not absolve the employer of all liability.
    - **EEOC v. McLeod Health, Inc., 271 F. Supp. 3d 813 (D. SC 2017), follows St. Joseph's.**



15

Reassignment: Burden of Proof

- The employee is a disabled person within the meaning of the ADA and has made any resulting limitations from his or her disability known to the employer;
- (2) The preferred option of accommodation within the employee's existing job cannot reasonably be accomplished;
- (3) The employee requested the employer reasonably to accommodate his or her disability by reassignment to a vacant position, which the employee may identify at the outset or which the employee may request the employer identify through an interactive process, in which the employee in good faith was willing to, or did, cooperate;
- (4) The employee was qualified, with or without reasonable accommodation, to perform one or more appropriate vacant jobs within the company that the employee must, at the time of the summary judgment proceeding, specifically identify and show were available within the company at or about the time the request for reassignment was made; and
- (5) The employee suffered injury because the employer did not offer to reassign the employee to any appropriate vacant position. *Bundy v. Chaves County Board of Commissioners*, (D. N.M. April 28, 2006).

16

Reassignment
The critical Question

- When an employee seeks reassignment, the critical question is whether the employee is a qualified individual for those new jobs and not whether she was qualified for her current position. *EEOC v. St. Joseph Hospital*.

17

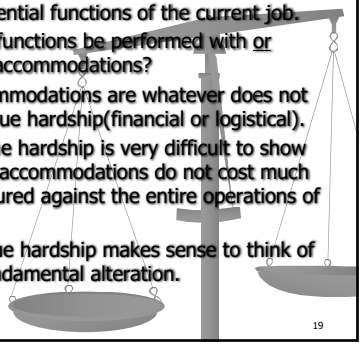
A Preventive Law Approach to Reassignment

- First question: How far do you want to go?
  - Possibly beyond the law to minimize litigation?
  - Only to what may be the letter of the law and litigate as a matter of principle?
  - Supreme Court view: Circuit Court split exists. Supreme Court now full 9 Justices. If guessing, 11th Circuit view will prevail by at least a 5-4 margin, especially given the current Supreme Court makeup and its views on affirmative action.

18

A Preventive Law Approach to Reassignment Continued

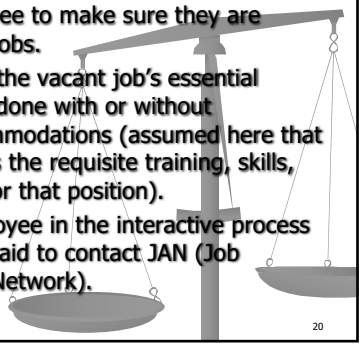
- Know the actual essential functions of the current job.
- Can those essential functions be performed with or without reasonable accommodations?
  - Reasonable accommodations are whatever does not constitute an undue hardship(financial or logistical).
    - financial undue hardship is very difficult to show because most accommodations do not cost much and it is measured against the entire operations of the entity.
    - Logistical undue hardship makes sense to think of in terms of fundamental alteration.



19

Preventive Law and Reassignment Continued

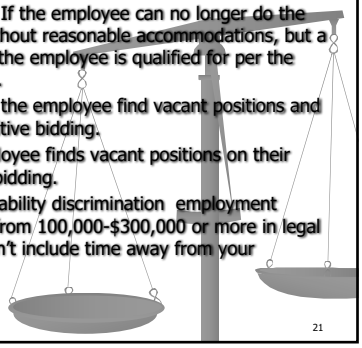
- Assist the employee to make sure they are aware of vacant jobs.
- Analyze whether the vacant job's essential functions can be done with or without reasonable accommodations (assumed here that the employee has the requisite training, skills, and experience for that position).
- Engage the employee in the interactive process and do not be afraid to contact JAN (Job Accommodation Network).



20

Preventive Law and Reassignment Continued

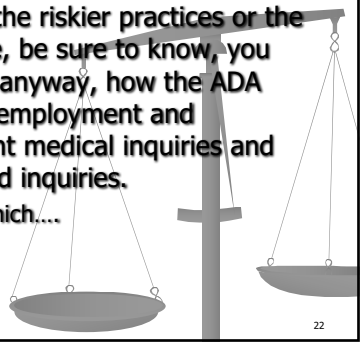
- Maximum prevention: If the employee can no longer do the current job with or without reasonable accommodations, but a vacant job exists that the employee is qualified for per the ADA, make the switch.
- Riskier practice: Help the employee find vacant positions and then allow for competitive bidding.
- Riskiest practice: Employee finds vacant positions on their own and competitive bidding.
  - Not unusual for disability discrimination employment litigation to range from 100,000-$300,000 or more in legal fees and that doesn't include time away from your business.



21

Preventive Law and Reassignment Continued

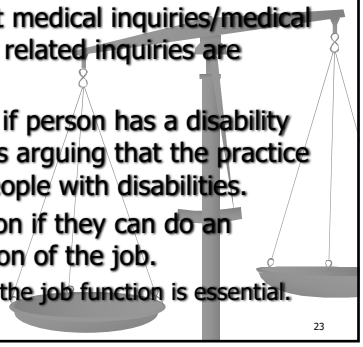
- If engaging in the riskier practices or the riskiest practice, be sure to know, you should know it anyway, how the ADA deals with pre-employment and postemployment medical inquiries and disability related inquiries.
  - Speaking of which….



22

Disability Related Inquiry and Medical Exams

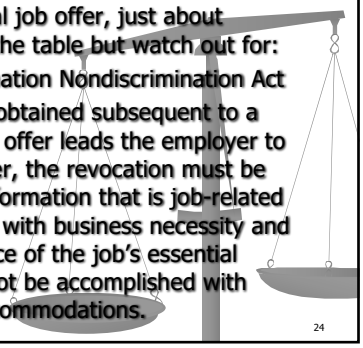
- Preemployment medical inquiries/medical exam/disability related inquiries are prohibited.
- Doesn't matter if person has a disability unless person is arguing that the practice screens out people with disabilities.
- Can ask a person if they can do an essential function of the job.
  - Better be sure the job function is essential.



23

Disability Related Inquiry and Medical Exams Continued

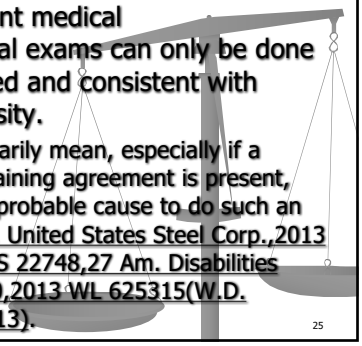
- After a conditional job offer, just about everything is on the table but watch out for:
  - Genetic Information Nondiscrimination Act
  - If information obtained subsequent to a conditional job offer leads the employer to revoke the offer, the revocation must be based upon information that is job-related and consistent with business necessity and the performance of the job's essential functions cannot be accomplished with reasonable accommodations.



24

Disability Related Inquiry and Medical Exams Continued

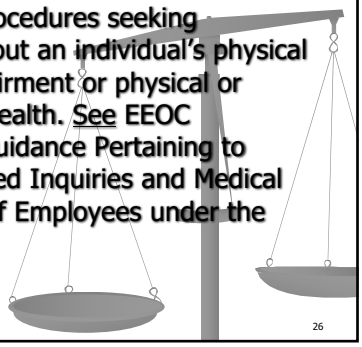
- Post employment medical inquiries/medical exams can only be done when job-related and consistent with business necessity.
  - Doesn't necessarily mean, especially if a collective bargaining agreement is present, that you need probable cause to do such an exam (EEOC v. United States Steel Corp.,2013 U.S. Dist. LEXIS 22748,27 Am. Disabilities Cas. (BNA) 990,2013 WL 625315(W.D. Pa.Feb. 20, 2013).



25

Definitions: What Is a Medical Exam?

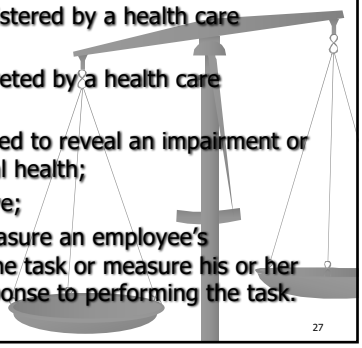
- Any tests or procedures seeking information about an individual's physical or mental impairment or physical or psychological health. See EEOC Enforcement Guidance Pertaining to Disability Related Inquiries and Medical Examinations of Employees under the ADA.



26

Factors for Determining if a Medical Exam Has Occurred

- Is the test administered by a health care professional;
- Is the test interpreted by a health care professional;
- Is the test designed to reveal an impairment or physical or mental health;
- Is the test invasive;
- Does the test measure an employee's performance of the task or measure his or her physiological response to performing the task.



27

Medical Exam Continued

- Is the test normally given in a medical setting;
- Is medical equipment used
- Keep in mind:
  - Not all factors need be satisfied.
  - Some combination or even one by itself may be sufficient.

28

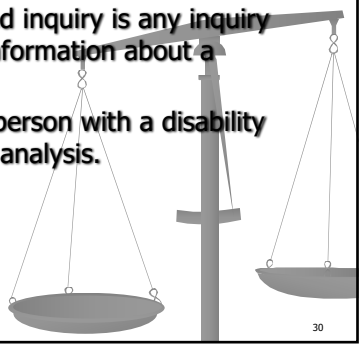
Nonexclusive List of Medical Examinations

- Vision test
- Blood pressure
- Cholesterol screening
- Range of motion test
- Diagnostic procedures
- Urine test to purposes are to discover alcohol use or detect diseases that are genetic markers

29

What Is a Disability Related Inquiry?

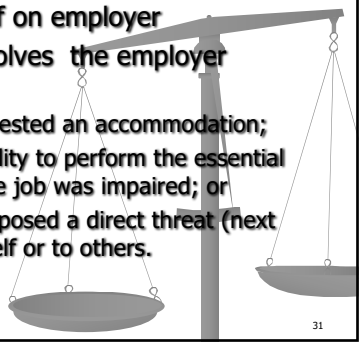
- Disability related inquiry is any inquiry likely to elicit information about a disability.
- Helps to get a person with a disability involved in the analysis.



30

Job Related

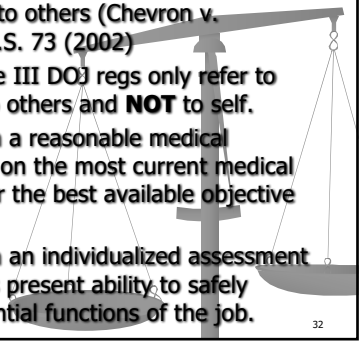
- Burden of proof on employer
- Job-related involves the employer showing:
  - Employee requested an accommodation;
  - Employee's ability to perform the essential functions of the job was impaired; or
  - The employee posed a direct threat (next slide), to himself or to others.



31

Direct Threat

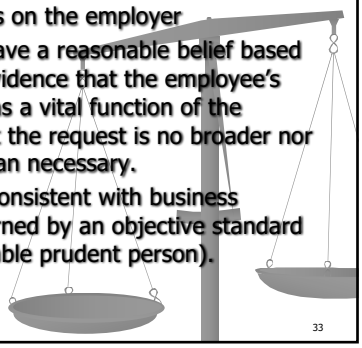
- Can be to self or to others (Chevron v. Echazabal, 536 U.S. 73 (2002)
  - Title II and title III DOJ regs only refer to direct threat to others and **NOT** to self.
- Must be based on a reasonable medical judgment relying on the most current medical knowledge and/or the best available objective evidence
- Must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job.



32

Business Necessity

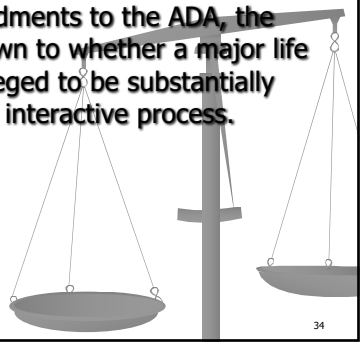
- Burden of proof is on the employer
- Employer must have a reasonable belief based upon objective evidence that the employee's behavior threatens a vital function of the business and that the request is no broader nor more intrusive than necessary.
- Job-related and consistent with business necessity is governed by an objective standard (ordinary reasonable prudent person).



33

Chemical Sensitivity

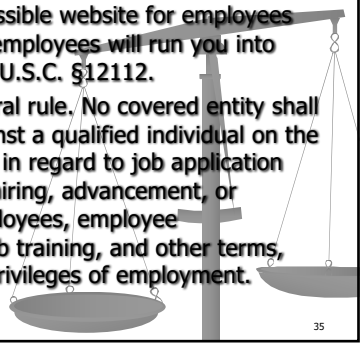
- With the amendments to the ADA, the cases come down to whether a major life activity was alleged to be substantially limited and the interactive process.



34

Website Accessibility Title I

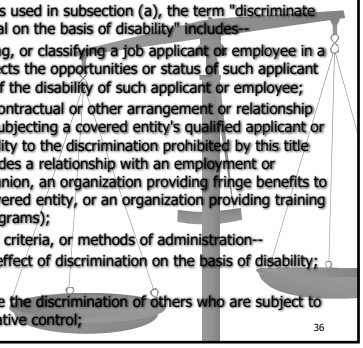
- Having an inaccessible website for employees and prospective employees will run you into trouble under 42 U.S.C. §12112.
- §12112(a) General rule. No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.



35

42 U.S.C. §12112(b)

- §12112(b) Construction. As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes--
  - (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
  - (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
  - (3) utilizing standards, criteria, or methods of administration--
    - (A) that have the effect of discrimination on the basis of disability; or
    - (B) that perpetuate the discrimination of others who are subject to common administrative control;



36

42 U.S.C. §12112(b) Continued

- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
- (5) (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
  - (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

37

42 U.S.C. §12112(b) Continued

- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
- (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

38

Hot TopicsYou Will Find in Title II Slides

- Definition of qualified/otherwise qualified.
- Service dogs outside of the employment context.
- What is a program?
- Whose program is it?
- A hot topic you will not find in the slides.
  - Effective communication title II v. title III rules.

39

Qualified/Otherwise Qualified Individual with a Disability Title II/RA

An individual is qualified/otherwise qualified if s/he meets the essential eligibility requirements of the program, benefit, or activity with or without:

- Reasonable modifications to rules, policies or practices;
- Auxiliary aids and services; or
- Removal of architectural, communications or transportation barriers.

- Must be a person with a disability and qualified to be protected by ADA/Rehabilitation Act.

40

Case Study: Service Dog Outside Employment context

Larry, a witness in a case, comes to your facility with a dog that he claims is his service animal. Larry has no visible disability.

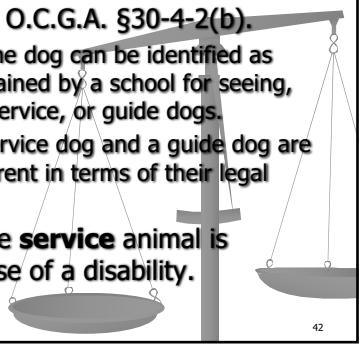
How do you proceed?

28 C.F.R. 35.160(a)[1]

41

What not to do: Take The Georgia Approach

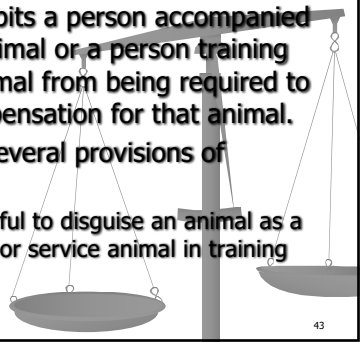
- Slavishly follow O.C.G.A. §30-4-2(b).
  - Do not ask if the dog can be identified as having been trained by a school for seeing, eye, hearing, service, or guide dogs.
  - Think that a service dog and a guide dog are somehow different in terms of their legal requirements.
- Ask whether the **service** animal is required because of a disability.



42

Service Dogs: NC Approach

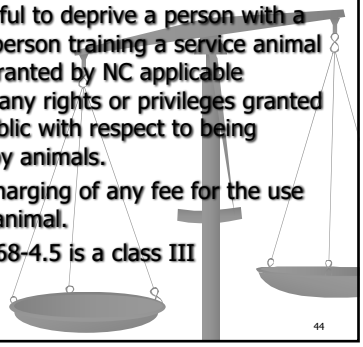
- §168-4.4 prohibits a person accompanied by a service animal or a person training the service animal from being required to pay extra compensation for that animal.
- §168-4.5 has several provisions of interest:
  - Makes it unlawful to disguise an animal as a service animal or service animal in training when it isn't.



43

Service Dog: NC Approach Continued

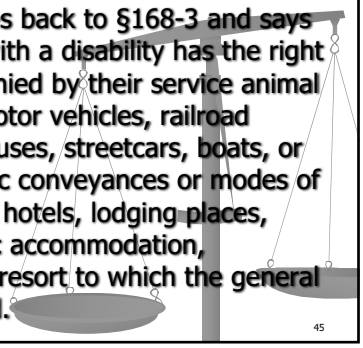
- Makes it unlawful to deprive a person with a disability or a person training a service animal of any rights granted by NC applicable statutes for of any rights or privileges granted the general public with respect to being accompanied by animals.
- Prohibits the charging of any fee for the use of the service animal.
- Violation of §168-4.5 is a class III misdemeanor.



44

Service Dog: NC Approach Continued

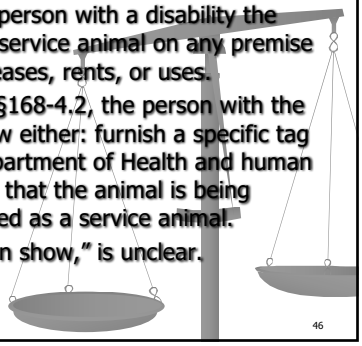
- §168-4.2 relates back to §168-3 and says every person with a disability has the right to be accompanied by their service animal in airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats, or any other public conveyances or modes of transportation; hotels, lodging places, places of public accommodation, amusement or resort to which the general public is invited.



45

Service Dog: NC Approach Continued

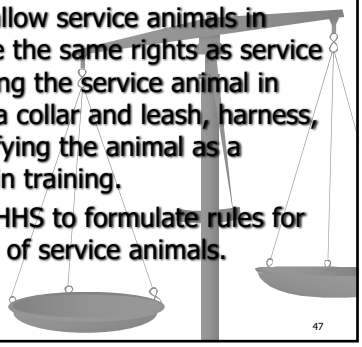
- §168-4.2 gives a person with a disability the right to keep the service animal on any premise that the person leases, rents, or uses.
- To qualify under §168-4.2, the person with the disability can show either: furnish a specific tag issued by the Department of Health and human services; or show that the animal is being trained or is trained as a service animal.
  - Meaning of "can show," is unclear.



46

Service Dog: NC Approach Continued

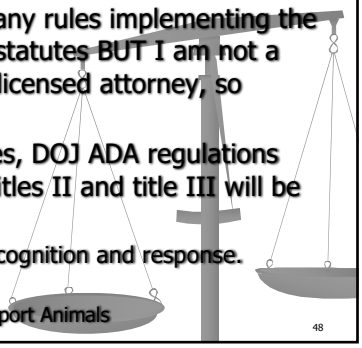
- §168-4.2 also allow service animals in training to have the same rights as service animals providing the service animal in training wears a collar and leash, harness, or keeps identifying the animal as a service animal in training.
- §168-4.3 NC DHHS to formulate rules for the registration of service animals.



47

Service Dog: NC Approach Problems

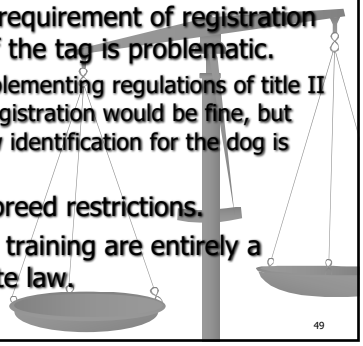
- Unable to find any rules implementing the service animal statutes BUT I am not a North Carolina licensed attorney, so double check.
- Absent any rules, DOJ ADA regulations implementing titles II and title III will be helpful.
  - Key there is recognition and response.
    - Therapy dogs
    - Emotional Support Animals



48

Service Dog: NC Approach Problems Continued and Notes

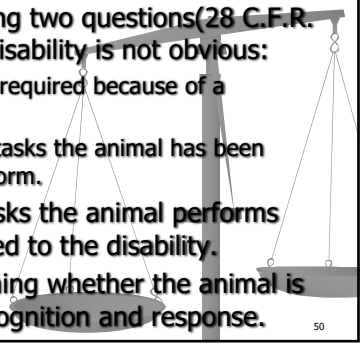
- North Carolina requirement of registration and showing of the tag is problematic.
  - Under DOJ implementing regulations of title II and title III, registration would be fine, but having to show identification for the dog is problematic.
- Watch out for breed restrictions.
- Service dogs in training are entirely a creature of State law.



49

What to do: Service Dog: Outside of Employment Context

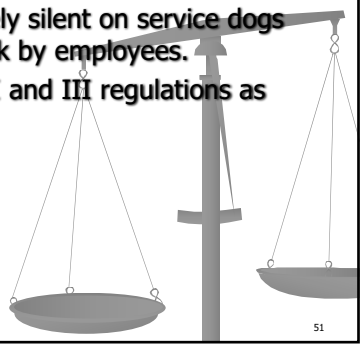
- Ask the following two questions(28 C.F.R. §35.136(f), if disability is not obvious:
  - Is the **animal** required because of a disability?
  - What work or tasks the animal has been trained to perform.
- The work or tasks the animal performs has to be related to the disability.
- Key is determining whether the animal is engaged in recognition and response.



50

Service Dog: Employment Context

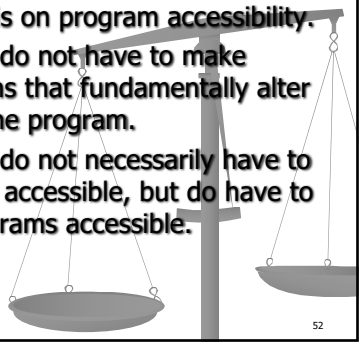
- EEOC completely silent on service dogs brought to work by employees.
- Use DOJ title II and III regulations as guidance.



51

Program Accessibility Under Title II of the ADA

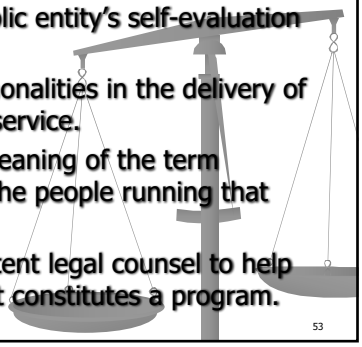
- Title II's focus is on program accessibility.
- Title II entities do not have to make accommodations that fundamentally alter the nature of the program.
- Title II entities do not necessarily have to have be facility accessible, but do have to have their programs accessible.



52

Figuring Out Just What is a Program

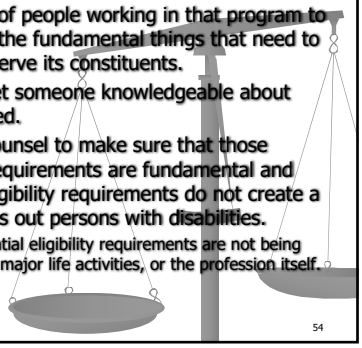
- Review the public entity's self-evaluation plan.
- Consider commonalities in the delivery of the program's service.
- Consider the meaning of the term "program," to the people running that program.
- Consult competent legal counsel to help determine what constitutes a program.



53

Determining Essential Eligibility Requirements

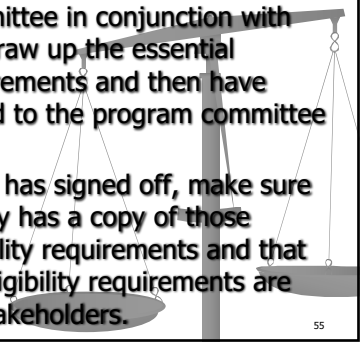
- Set up a committee of people working in that program to determine what are the fundamental things that need to happen in order to serve its constituents.
  - Make sure you get someone knowledgeable about disabilities involved.
- Consult with legal counsel to make sure that those essential eligibility requirements are fundamental and that the essential eligibility requirements do not create a situation that screens out persons with disabilities.
  - Make sure that essential eligibility requirements are not being confused with tasks, major life activities, or the profession itself.



54

Determining Essential Eligibility Requirements Continued

- Have the committee in conjunction with legal counsel draw up the essential eligibility requirements and then have them submitted to the program committee for a vote.
- Once everyone has signed off, make sure the public entity has a copy of those essential eligibility requirements and that the essential eligibility requirements are known to all stakeholders.

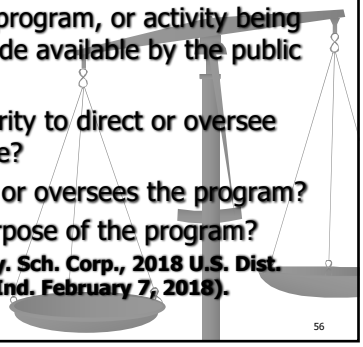


55

Whose Program is it?

- Is the service, program, or activity being provided or made available by the public entity?
- Who has authority to direct or oversee ADA compliance?
- Who organizes or oversees the program?
- What is the purpose of the program?

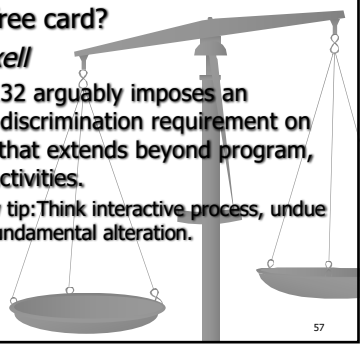
Ashby v. Warrick Cty. Sch. Corp., 2018 U.S. Dist. LEXIS 19910 (S.D. Ind. February 7, 2018).



56

What if a Program, Service, Activity is not Involved?

- Get out of jail free card?
- *Haberle v. Troxell*
  - 42 U.S.C. §12132 arguably imposes an additional non-discrimination requirement on title II entities that extends beyond program, services, and activities.
    - Preventive law tip:Think interactive process, undue burden, and fundamental alteration.



57

For Administrative Personnel

- Familiarize yourself with the facility's accessibility features and accommodation protocol.
- Know your §504/ADA coordinator.
- Have an ADA grievance procedure.
  - Required by ADA if 50 or more employees and by Rehabilitation Act if 15 or more employees.
- Respond courteously and respectfully to all accommodation requests and be sure to promptly direct the request to appropriate personnel who can assist.

58

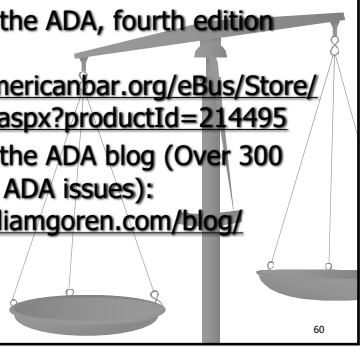
Thank you!

Comments and/or Questions?

59

Resources

- Understanding the ADA, fourth edition (ABA 2013), https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=214495
- Understanding the ADA blog (Over 300 blog entries on ADA issues): http://www.williamgoren.com/blog/



60

AN OVERVIEW OF SEXUAL AND GENDER-BASED HARASSMENT IN EMPLOYMENT AND EDUCATION[1]

May 2018

I. GENERAL[2]

A. Sexual and gender-based harassment are forms of sex discrimination, in violation of Title VII of the Civil Rights Act of 1964 (enforced by the U.S. Equal Employment Opportunity Commission) and Title IX of the Education Amendments of 1972 (enforced by the Office for Civil Rights of the U.S. Department of Education). The Clery Act also requires private and public institutions of higher education to have policies prohibiting sexual assault, domestic and dating violence, and stalking.

B. Charges of sexual harassment filed with the EEOC and parallel state agencies increased from 7,000 in FY 1991 (the year in of the Clarence Thomas confirmation hearing) to a high of 16,000-17,000 in FY 1997.[3] They gradually dropped over the next 20 years to 9600 in FY 2017.[4] Charges of gender-based and sexual harassment received just by the EEOC stayed steady at about 12,500 from 2010 to 2017.[5]

Between FY 2007 and FY 2009, OCR received approximately 170 Title IX complaints annually involving allegations of sexual harassment; of these, 20 alleged sexual violence. By 2016, OCR received 260 complaints just alleging sexual violence, a form of sexual harassment.[6]

C. Some survey statistics:

1. 2002 survey by Employment Law Alliance of 1000 adults: 21% of women and 7% of men reported being sexually harassed at work. According to a 2016 report commissioned by the EEOC, as many as 60% of women reported being sexually harassed at work.[7]

2. In a 2001 survey by the American Association of University Women (AAUW) Educational Foundation, 83% of girls and 79% of boys in 8th through 11th grades said they had

---

[1] This outline was prepared to facilitate a presentation at a public employment law conference. It does not represent the views of Duke University nor is it intended to provide legal advice.

[2] While this outline discusses sexual and gender-based harassment, many of the same general principles apply to gender-based harassment and harassment based on race, national origin, disability, and other protected characteristics. information on harassment in the employment context can be found on the web site for the U.S. Equal Employment Opportunity Commission at https://www.eeoc.gov/laws/types/harassment.cfm, last accessed 4/29/2018. Information on harassment in the educational context can be found on the web site for the Office for Civil Rights of the U.S. Department of Educations at https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/har-resources.html, last accessed 4/29/2018.

[3] https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm, last accessed 4/29/2018.

[4] https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_fepas_by_state.cfm, last accessed 4/29/2018.

[5] https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm, last accessed 4/29/2018.

[6] https://www2.ed.gov/about/offices/list/ocr/congress.html, last accessed 4/29/2018.

[7] Select Task Force on the Study of Harassment in the Workplace, June 2016, https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686302, last accessed 4/29/2018.

experienced some form of sexual harassment.[8]

3. In its 2005 study on sexual harassment at colleges, the AAUW reported that 62% of female college students and 61% of male college students report having been sexually harassed at their university. Of those who were harassed: 80% were harassed by another student or former student, 39% said the incident(s) occurred in the dorm, and 10% or less attempted to report their experiences to a university employee.[9]

4. A 2010 Department of Justice study estimated that 20-25 percent of college women are victims of rape or attempted rape during their time in college.[10] In 2008, there were nearly 3,300 forcible sex offenses reported by college campuses[11] and in the 2005-2006 school year, there were over 200 reported incidents of rape and over 2,000 reported incidents of other sexual batteries at public high schools.[12] In a survey developed by the Association of American Universities, 23% of female undergraduate students and 5.4% of male undergraduates reported experiencing nonconsensual sexual contact by physical force, threats of force, or incapacitation while enrolled at their university.[13]

(Note that the definitions of harassment used in these studies are often different than the legal definitions set out below.)

II. ELEMENTS OF SEXUAL or GENDER-BASED HARASSMENT CLAIM

A. The challenged conduct must be **unwelcome**.

B. The conduct must be of a sexual nature or otherwise **based on sex**.

C. The challenged conduct must have resulted in a **tangible consequence** or a **hostile or abusive environment** that denies or limits an employee's or student's employment or ability to participate in or receive benefits, services, or opportunities in the school's program.

D. There must be a legal basis for holding the employer or school **responsible** for the harassment.

---

[8] AAUW Educational Foundation, Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School (2001), available at http://www.aauw.org/learn/research/upload/hostilehallways.pdf.
[9] American Association of University Women, Drawing the Line: Sexual Harassment on Campus (December 2005), available at http://www.aauw.org/advocacy/laf/lafnetwork/library/harassment_stats.cfm.
[10] Fisher, B., Cullen, F., and Turner, M. *The Sexual Victimization of College Women*, National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. Washington, DC. December 2010, available at http://www.ncjrs.gov/pdffiles1/nij/182369.pdf, last accessed 4/29/2018.
[11] U.S. Department of Education, Office of Postsecondary Education, Summary Crime Statistics (data compiled from reports submitted in compliance with the Clery Act), available at http://www.ed.gov/admins/lead/safety/criminal2006-08.pdf, last accessed 4/29/2018.
[12] U.S. Department of Education, School Survey on Crime and Safety (2006), available at http://nces.ed.gov/surveys/ssocs/tables/sc_2006_tab_03.asp, last accessed 4/29/2018.
[13] https://www.aau.edu/newsroom/press-releases/aau-releases-campus-climate-survey-sexual-assault-and-sexual-misconduct, last accessed 4/29/2018.

III. UNWELCOMENESS

A. Sexual and gender-based harassment are unlawful only if it is unwelcomed to the complainant. "Unwelcome" means that the employee or student did not solicit or invite the conduct and regarded it as undesirable.

B. The critical inquiry is whether the complainant explicitly or implicitly communicated to the alleged harasser that the conduct was unwelcome, either directly or through another means.

- Submission to sexual demands does not mean that the demands were welcome, but active participation in the challenged conduct would likely defeat a claim.

IV. BASIS

A. Harassment based on sex or sex/gender stereotyping violates Title VII and Title IX whether or not sexual conduct is involved.

- In *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989), the Supreme Court held that Title VII's prohibition against discrimination based on sex included decisions based on sex or gender stereotyping; i.e., when an employee is treated negatively because the employee doesn't meet the employer's expectations of appropriate conduct for an individual of that sex (that women should not be aggressive).

- Several courts have relied on a gender stereotyping analysis to hold that Title VII or Title IX prohibit discrimination based on gender identity (i.e., transgender status) and even sexual orientation. *See, e.g.*, *EEOC v. R.G. & G.R. Harris Funeral Homes*, F.3d (6th Cir. 2018) (transgender status); *Zarda v. Altitude Express, Inc*., F.3d (2nd Cir. 2018) (sexual orientation); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Circ. 2017) (e*n banc*) (sexual orientation); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034 (7th Cir. 2017 (transgender status); *Glenn v. Brumby,* 663 F.3d 1312 (11th Cir. 2011) (transgender status); *Students and Parents for Privacy v. U.S. Dept. of Education and Township High School Dist. 211*, F.Supp.3d (N.D. Ill. 12/29/2017) (transgender status). *But see, e.g., Evans v. Georgia Regional Hospital*, F.3d (11th Cir. 2017) (holding that sexual orientation is not included in the definition of sex discrimination); *Pambianchi v. Ark. Tech. Univ*., F.Supp.3d (E.D. Ark. 3/14/2014) (same).

B. If the harasser and the target are of the same sex, a violation can still be found as long as the victim was targeted because of their sex. According to the Supreme Court, conduct will be considered sexual harassment as long as it is "because of sex" or "on the basis of sex." *See Oncale v. Sundowner Offshore Oil Services,* 523 U.S. 75 (1998). This includes gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Again, this can include harassment because the employee or student exhibits what is perceived as a stereotypical characteristic *for* their sex, or for *failing to conform to* stereotyped notions of masculinity and femininity.

V. HARASSMENT BY SUPERVISORS AND TEACHERS, PROFESSORS AND EMPLOYEES WITH ACADEMIC RESPONSIBILITIES

A. **Definition in employment:** When a supervisor undertakes a tangible employment action (*e.g.,* firing or denial of promotion) based on an employee's response to (or rejection of) unwelcome sexual demands. *See Faragher v. Boca Raton, 524 U.S. 775 (1998), and Burlington Industries v. Ellerth, 524 U.S. 742 (1998).* This is often called *quid pro quo* harassment.

B. **Definition in education**: A school, college, or university generally provides its services to students through the responsibilities it gives to its employees. When a teacher, professor, or other employee engages in sexual harassment in the course of carrying out these responsibilities, and the harassment denies or limits a student's ability to participate in or benefit from the services on the basis of sex. This includes, but is not limited to, those situations where a teacher or other employee makes an educational decision based on the student's submission to unwelcome sexual demands. *See Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html, last accessed 4/29/2018.

C. Only a supervisor, manager, teacher, or other individual in a position of authority can commit this form of harassment.

D. The demand for sexual favors in return for tangible benefits can be implicit.

E. One instance of a decision being based on submission to conduct of a sexual nature is sufficient to violate the law/make the employer or school responsible for the conduct. When a teacher or professor engages in harassment outside the context of their responsibilities and for peer and third party harassment, the conduct has to be sufficiently serious to create a hostile environment (see VI below).

F. Employer responsibility under Title VII: An employer is *automatically* liable for this type of harassment, regardless of whether upper management knew of it. *Burlington* and *Faragher*.

G. School responsibility under Title IX: Same as to enforcement of Title IX by OCR (but see VI.E below).

VI. HOSTILE ENVIRONMENT HARASSMENT

A. **Definition:**

> Employment: Unwelcome sexual comments or conduct that unreasonably interferes with an employee's work performance or creates an intimidating, hostile, or offensive work environment.
>
> Education: Unwelcome sexual comments or conduct that denies or limits a student's ability to participate in or benefit from their education program.

B. *Anyone* can commit this type of harassment -- a supervisor, co-worker, teacher, residential advisor, another student, or a visitor.

C. Standards governing whether unwelcome sexual conduct creates an unlawful hostile environment:

1. The key issues are frequency, severity, and/or pervasiveness; e.g., the more severe the conduct, the less frequent it must be to create a hostile environment; the less severe, the more frequent it must be.

- Both objective and subjective standards apply: How would a "reasonable person" in the individual's position/situation have reacted? How did the individual actually react?

2. Nothing tangible about the individual's job or education need be affected.

3. Severe psychological harm is not necessary to establish a violation.

D. **Employer responsibility under Title VII:**

1. **Hostile environment harassment by supervisors:** Under Supreme Court decisions in *Burlington* and *Faragher*, the employer is liable even if higher management did not know of the supervisor's harassment, unless the employer can prove that:

a. it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and

b. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

c. Definition of supervisor: In *Vance v. Ball State University*, 570 U.S. , 133 S. Ct. 2434 (2013), the Supreme Court held that an employee is a supervisor if the employer has given that employee the authority "to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'"

2. **Hostile environment harassment by supervisors outside the scope of their authority or by co-workers:** The employer is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action. In *Vance*, the Court stated that an employer is liable for hostile work environment harassment by employees who are not supervisors if the employer was "negligent in failing to prevent harassment from taking place." In assessing such negligence, the Court explained, "the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent." Also relevant is "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed."[14]

[14] Adapted from https://www.eeoc.gov/policy/docs/harassment.html, last accessed 4/29/2018.

3. **Hostile environment harassment by non-employees:** The employer is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action within its control.

E. **School/college/university responsibility under Title IX:**

1. According to the Supreme Court in *Davis v. Monroe County Schools, 526 U.S. 629 (1999),* and *Gebser v. Lago Vista Independent School District*, *524 U.S. 279 (1998),* a school will not be liable for damages in a private lawsuit unless there is actual notice to someone with authority to take corrective action, and the school responds with "deliberate indifference."

2. However, in a complaint filed with OCR, OCR would hold the school responsible for **hostile environment harassment of a student by a teacher, professor,** or other employee if that person conducted the harassment in the context of carrying out the responsibilities given to him or her by the school – regardless of whether the school knew of the harassment. As to **hostile environment harassment by teachers, professors, or other employees in other contexts, harassment by other students, or harassment by third parties**, the school would be responsible if it knew or reasonably should have known of the harassment and failed to take immediate and appropriate corrective action. **If a responsible school employee knows of the harassment but is not in a position to take corrective action him/herself, he or she should report it to someone who can.**

VII. REMEDIES UNDER TITLE VII FOR SEXUAL HARASSMENT

A. Injunctive relief to stop the harassment and prevent any further harassment.

B. Reinstatement and back pay, if a job or promotion was lost due to the harassment.

C. Compensatory and punitive damages (with caps).

D. Attorney's fees.

VIII. REMEDIES UNDER TITLE IX FOR SEXUAL HARASSMENT

A. Injunctive relief preventing further harassment.

B. Reinstatement in or opportunity to retake course/program, reimbursement of lost tuition, counseling, other relief necessary to put the student in the same position he or she would have been in had the harassment not occurred.

C. In private lawsuits for damages, no limit on amount, but only if actual notice to someone in authority to take corrective action who responds with deliberate indifference.

D. In private lawsuits, attorneys' fees.

IX. PREVENTIVE AND CORRECTIVE MEASURES

A. Anti-Harassment Policy and Complaint Procedure

1. Under both Title VII and Title IX, employers and schools should establish and disseminate to all employees and students (and parents of K-12 students) a policy that defines sexual and gender-based harassment and other forms of unlawful harassment, as well as a prompt and equitable procedure for complaining of harassment. The policy and procedure should make clear that such conduct will not be tolerated.

2. An anti-harassment policy should make clear that employees, students, and others will be **protected against retaliation** for making complaints or for assisting in investigations.

3. It is recommended that the complaint procedure designate multiple officials to receive complaints, since a designated official might be the alleged harasser.

4. Supervisors, teachers, professors, residence staff, administrators, and other responsible staff should be instructed to take immediate and appropriate corrective action whenever they are aware of harassment, including reporting the matter to appropriate officials.

B. Corrective Action

1. If it is determined that harassment occurred, corrective action should be undertaken immediately. In any event, the parties should be informed of the outcome of the complaint.

2. Corrective measures include steps reasonably designed to end the harassment and ensure that it **does not recur.**

    - The severity of disciplinary action should depend on factors such as the severity and frequency of the misconduct, the impact on the complainant, (for schools) the age of the individuals involved, and whether the harasser previously engaged in similar misconduct.

    - Steps should be taken to correct any discriminatory effects on the complainant and others, if appropriate. This can include (age-appropriate) training and other educational measures as to the nature of harassment, its effects, and how to report it.

3. If unwelcome sexual conduct occurred, but it was not sufficiently severe or pervasive to constitute unlawful harassment, steps should still be taken to ensure that no further such conduct occurs in order to **prevent** it from reaching that level.

4. Corrective measures should *not* adversely affect complainant *(e.g.,* if the harasser and the target must be separated, harasser should be moved).

C. Other Preventive Measures

1. Routinely educate all employees and students (for schools, in age-appropriate ways) about what constitutes unlawful harassment and about the anti-harassment policy and complaint procedure.

2. Train supervisors, administrators, teachers, and other responsible employees on how to identify and respond to harassment.

3. Monitor enforcement of the anti-harassment policy.

4. Evaluate the climate at your organization or institution, e.g., through surveys, focus groups, labor/management committees, etc.

    - Consider possibility of public records request for results – reputation, use in lawsuit.

5. **The Challenges of Training.** As reported in the 2016 *Report of the Select Task Force on the Study of Harassment in the Workplace*,[15] "There are deficiencies in almost all the empirical studies done to date on the effectiveness of training standing alone. Hence, *empirical* data does (sic) not permit us to make declarative statements about whether training, standing alone, is or is not an effective tool in preventing harassment."

    But the report goes on to conclude that, deficiencies notwithstanding, "training is an essential component of an anti-harassment effort" – as part of a broader strategy that includes elements of leadership and accountability. Indeed, according to research cited in the Report, training programs on their own may not have a significant effect on changing employees' attitudes (much less reducing prevalence), and they may sometimes have the opposite effect (e.g., leading to a "blame the victim" or other backlash response).

    In developing a training program:

    - Consider purpose of training, size of your organization, resources available. If primarily for compliance purposes, e.g., to create the basis for a *Farragher/Ellerth* defense, may want to consider one-time, on-line training. Same if a big organization. But best practice if you can afford it is small group, periodic live training.

    - If possible, start with the onboarding process. Include a statement by senior leadership on the organization's or institution's values, an explanation of its policies, examples of prohibited conduct and conduct that – if left unchecked – could rise to the level of prohibited conduct, examples of acceptable conduct, where and how to complain, prohibitions against retaliation. Reinforce this with follow-up training that includes the dynamics of sexual and gender-based harassment, including sexual violence; the impact of power disparities between supervisor and subordinate or teacher/professor and student on the person with less power to meaningfully consent; cultural differences and assumptions, including language differences in the workplace and generational differences; issues around gender identity, gender expression, and sexual orientation; use

[15] https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_ftnref159, last accessed 4/29/2018.

of social media; First Amendment/free speech considerations; what to expect should an employee or student file a complaint; and the protections against retaliation. Consider using a scenario-based approach.

- Provide additional training for management on how to recognize sexual or gender-based harassment, whether/how to intervene, and their reporting responsibilities. For example, consider adapting the scenario at the end of this document to your work environment for small group discussion. The purpose isn't to get answers so much as to raise awareness and issue-spot.

The Select Task Force Report goes on to recommend two promising training strategies that could help to shape an organizational culture that rejects harassment – **workplace civility** training[16] and **bystander intervention** training. Indeed, a study on the Green Dot bystander intervention training program used in the educational context has shown that it was successful in not only increasing knowledge and changing attitudes amongst high school students, but also in reducing the prevalence of harassment[17] – one of the only studies in any context that has been proven to do this. According to the Task Force Report, the basic components of a bystander training program should include:

- *Creating awareness* - enable bystanders to recognize potentially problematic behaviors.

- *Creating a sense of collective responsibility* - motivate bystanders to step in and take action when they observe problematic behaviors.

- *Creating a sense of empowerment* - conduct skills-building exercises to provide bystanders with the skills and confidence to intervene as appropriate.

- *Providing resources* - provide bystanders with resources they can call upon and that support their intervention.

[16] *See, e.g., Workplace Bullying: Escalated Incivility,* Ivey Business Journal, November/December 2003, https://iveybusinessjournal.com/publication/workplace-bullying-escalated-incivility/, last accessed 4/29/2018.
[17] https://alteristic.org/high-school-program-reduces-interpersonal-violence-independent-study-confirms/, last accessed 4/29/2018.

Sample Management Training Scenario

The Department Manager comes to you (as EEO or HR representative) to say that she has recently learned that Supervisor Jones frequently calls the female staff in the office by such terms as "sweetie" and "darling." She wants to know what to do?

- Is this sexual harassment? Sex-based harassment? [What does Jones call the male staff?]
    - Unwelcome?
    - Have there been any complaints?
    - Would it matter if Dr. Jones was male? Female?
- Should you or the Department Manager refer it for investigation?

The Department Manager also tells you that Manager Jones has been meeting privately with Terry Smith, a program analyst up for promotion, ostensibly about a departmental project…but that, on several occasions, Smith has been seen coming out of Jones' office looking upset and even crying.

- Sexual harassment?
    - Would it matter if both Jones and Smith were male? Female?
- What might the Department Manager or you do?

You and the Department Manager talk with Smith, and she tells you that the reason why she's been upset is because of disagreements over the project…but several staff members have told you that Smith has told them that Jones has been using the project meetings to discuss tensions in his marriage.

- Sexual harassment?

Not only that, according to the other employees, Smith told them that Jones has [and stop to discuss after each one]:

- told them that Jones has frequently told her how attractive she is
- asked her about her dating situation
- occasionally touched her on her knee while they were meeting
- repeatedly asked her to join him for drinks after work
- on one occasion, blocked his office door so that she could not leave until she agreed to go out for drinks

What do you do? How do you advise the Department Manager? Note that, if you go back to Jones, she will deny that any of this has happened.

To close the discussion, review your organization's policy and procedures

- Prohibited conduct –
    - sexual and gender-based harassment
        - quid pro quo
        - hostile environment – unwelcome conduct of a sexual nature or based on gender that is serious enough to interfere with working conditions
    - sexual assault
    - retaliation (among other forms of harassment)
- Reporting options --
    - Any confidential resources, e.g., Employee Assistance Program?
    - Department management, HR staff, EEO office?
        - If target's supervisor or manager learns of possible harassment, MUST report it to higher-ups/EEO
    - Police for possibly criminal conduct?

    - Does your policy have a time limit for reporting?
- Are there several resolution options?
    - Informal – one-on-one meetings, intervention by supervisor, facilitated conversation or mediation
    - Formal complaint

Sexual Harassment: Training for Prevention

NOTES

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Cyber Attacks and Human Resources: The Experience of Three Counties

NOTES

Robert Joyce
Public Employment Law Update
May 11, 2018

You've Got to Follow Your Own Procedures: Tulley v. City of Wilmington

Every once in a while, the North Carolina appellate courts put forward a totally new interpretation of some aspect of the law of employment, in a way that has the potential to change the way employers act.

It happened in 1985

The Court of Appeals did that, for instance, in 1986 in *Sides v. Duke Hospital*, 74 N.C. App. 331.

A nurse at Duke Hospital claimed that she was dismissed in retaliation for testimony she had given in a medical malpractice lawsuit against Duke. She claimed she was fired because her truthful testimony under oath had cost Duke money. The superior court judge threw her case out, saying that she was alleging a tort—wrongful discharge—that simply did not exist. Even if what she claimed was true, Duke could dismiss her for that reason if it wanted to.

The court of appeals, when the case reached it in 1985, for the first time recognized the wrongful discharge tort as an exception to employment at will. To allow employers to punish their employees for testifying truthfully, the court said, would be "an affront to the integrity of our judicial system, an impediment to the constitutional mandate of the courts to administer justice fairly, and a violation of the right that all litigants in this State have to have their cases tried upon honest evidence fully given."

So, the court said, "while there might be a right to terminate a contract [of employment] at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy."

The "public policy" implicated in this case was the policy that every citizen should testify fully and truthfully at court. The public policy exemption to the doctrine of employment at will was given birth in North Carolina. The tort of wrongful discharge was born and it is alive and active today.

It may have just happened again

It is possible that the North Carolina Supreme Court has done it again, in 2018. It appears to have ruled that a public employee has a claim that the North Carolina Constitution is violated if (1) a public employer has a clear employment rule or policy, (2) the employer violates that rule or policy, and (3) the employee is injured.

That is, a failure to follow your own policy can, in itself, give rise to a constitutional violation.

This is not a due process case, the Court was clear to say. It does not turn on property interests. It applies to at-will employees. Violate your own employment rules and injure an employee and you may face constitutional consequences.

The case is *Tully v. City of Wilmington*, decided March 2 of this year.

Kevin Tully was an officer in the Wilmington Police Department. In 2011 he sought a promotion to the rank of sergeant. Because of the procedural status of the case at the time the Supreme Court issued its opinion, the Court accepted Tully's version of the facts as true.

In seeking the promotion, Tully took a written exam, but he did not achieve a passing score. That prevented him from proceeding in the promotion process. He received a copy of the official examination answers and discovered that the official answers were based on outdated law. He filed a grievance. He was told that the test answers were not something that could be the subject of a grievance.

The Police Department Policy Manual—which was not adopted as a city ordinance—provided that "[c]andidates may appeal any portion of the selection process." It also provided that "[i]f practical, re-application, re-testing, re-scoring and/or re-evaluation of candidates may be required if an error in the process is substantiated."

Tully filed a lawsuit in the superior court, alleging, among other things, that the city had violated his rights under Article I, Section 1 of the North Carolina Constitution. That section states:

> "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."

By denying his promotion due to his answers on the exam and then determining that such a reason could not be a subject of a grievance, Tully said, the city had deprived him of "the fruits of" his own labor. He asked the court for a declaration that he had been deprived of his constitutional right to the fruits of his labor and he asked for money damages.

After the case had made its way through the superior court and the Court of Appeals, the Supreme Court agreed with Tully. Taking Tully's claims as true, the Court said:

> "[W]e conclude that the City's actions here implicate Tully's right under Article I, Section 1 to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable because they contravene policies specifically promulgated by that employer for the purpose of having a fair promotional process."
>
> "[W]e hold that to state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements: (1) a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest; (2) the employer violated that policy; and (3) the plaintiff was injured as a result of that violation. If a public employee alleges these elements, he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor.

This decision concerns promotions. The three-part test that the Court sets out specifically applies to promotions. But the reasoning of the Court would seem to apply to all kinds of employment policies.

The implications are worthy of note. If a public employer has a clearly established rule or policy concerning an employment matter, and it violates that rule, and an employee is injured as a result of the violation, the employee has a claim that the North Carolina Constitution has been violated.

Time will tell whether the decision is as consequential as the 1985 *Sides* decision.

Robert Joyce
Public Employment Law Update
May 11, 2018

Pregnancy: Beyond Title VII to the FMLA and ADA

Is pregnancy "because of sex"?

Title VII of the Civil Rights Act of 1964 has, from the inception of the statute, forbidden an employer to "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." That is, it has, for more than 50 years prohibited discrimination in employment "because of sex."

When Title VII was enacted, there existed the most blatant—unapologetically blatant—forms of discrimination against women in employment. For example, newspaper want-ads[1] were often divided into two parts: *help wanted male* and *help wanted female*. It was common knowledge—not universally agreed to but commonly known—that there were men's jobs and there were women's jobs. Title VII from the first dealt with that kind of discrimination. It was clear that reserving a category of jobs for men amounted to discrimination "because of sex."

The Evolving Meaning of "Because of Sex"

Over time, the courts came to face situations not as straightforward as *help wanted male.* What about sexual harassment in employment? Can that constitute discrimination "because of sex"? For the first 12 years of Title VII, no court had so found. It was only in 1976, in the case of *Williams v. Saxbe*, 413 F. Supp. 1093 (D.D.C.), that a court first decided that sexual harassment could be unlawful under Title VII. The plaintiff claimed that her working conditions deteriorated, and she was subsequently terminated, because she turned down her supervisor's sexual advances. If she was telling the truth, had she stated a case for unlawful discrimination because of sex? The court thought so, saying that the case

> "presents the issue of whether the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964, as amended. This Court finds that it does. Defendants, however, make a cogent and almost persuasive argument to the contrary."

"A cogent and almost persuasive argument to the contrary," the court said. That is, the court was finding that the claim did fall within the "because of sex" requirement of Title VII, but it was a close question. In 2018, no longer is it considered a close question.

[1] Young people may have to google the term "newspaper want-ads" to figure out what it means.

Today, the courts face a similar set of issues around workplace discrimination alleged to be based on sexual orientation or gender identity. In a decision in February of this year, the federal Second Circuit Court of Appeals, *Zarda v. Altitude Express Inc*., 883 F.3d 100 (2nd Cir. 2018) said this:

> "We have previously held that sexual orientation discrimination claims . . . are not cognizable under Title VII."

That is, from the time that sexual orientation discrimination claims first arose under Title VII, this appeals court, like all the others, held that such discrimination was not "because of sex." But now, the court said, it was changing its mind:

> "We now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of ... sex.' To the extent that our prior precedents held otherwise, they are overruled."

A similar progression has happened under Title VII with respect to discrimination based on pregnancy, aided by two significant act of Congress.

1976: Pregnancy Discrimination is not Sex Discrimination

In *General Electric v. Gilbert*, 429 U.S. 125 (1976), the United State Supreme Court heard for the first time a Title VII claim of pregnancy discrimination. The employer had in place a disability plan that paid nonoccupational sickness and accident benefits. It explicitly excluded disabilities arising from pregnancy. Did the exclusion of pregnancy coverage amount to discrimination "because of sex"?

No, the Court said. The employer could have decided to have no disability plan at all. It instead chose to have a plan that is equal in its treatment of men and women. The fact that it does not cover a condition unique to women does not mean it is discriminatory against women.

> "The program divides potential recipients into two groups: pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[2]

The Court noted that the Equal Employment Opportunity Commission had released guidelines in 1972 under which the disability plan would have been found to be in violation of Title VII. The EEOC went too far, the Court said. Congress knew what it meant when it enacted Title VII, and the courts should not get too far ahead of it:

[2] Relying on its previous decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), a case decided under the Equal Protection Clause, not Title VII.

> "When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant. There is surely no reason for any such inference here."

1978: The Pregnancy Discrimination Act

So, with respect to pregnancy discrimination, the Supreme Court said that there was no good reason to assume that Congress, when it prohibited discrimination "because of sex," meant to prohibit discrimination because of pregnancy. After all, at any given time there are plenty of women are not pregnant. If Congress had meant to cover pregnancy, it could have said so.

In 1978, two years after the *Gilbert* decision, Congress did just that, in passing the Pregnancy Discrimination Act, as an amendment to Title VII. The PDA is very short, composed of just two clauses.

The first clause deals explicitly with the issue of whether discrimination on account of pregnancy is discrimination "because of sex." It provides that Title VII's "ter[m] 'because of sex' . . . include[s] . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." So Congress, with respect to pregnancy, took the step that the courts themselves took with respect to sexual harassment—and are now taking with respect to sexual orientation and gender identity discrimination—making it clear that the phrase "because of sex" is broader than it may have originally been thought.

The second clause says that:

> "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ."

Interpreting the Second Clause of the PDA

Courts found it immediately easy to interpret the first clause: discrimination on account of pregnancy is discrimination on account of sex. The first clause *prohibits* that kind of discrimination. But the second clause is different. It does not *prohibit* something—rather, it *requires* something. Employers "shall" treat their pregnant employees the same as non-pregnant employees who are similar in their ability or inability to work.

The federal Seventh Circuit Court of Appeals took up the task of interpreting the second clause in 1994 in the case of *Troupe v. May Department Stores, Co*., 20 F.3d 734 (7th Cir. 1994). Kimberly Troupe worked in a clothing store. She became pregnant and, because of morning sickness, was often tardy. She received a written warning that her tardiness was excessive. The

day before her maternity leave was to begin, she was fired, and the given reason was her tardiness.

Did her termination constitute discrimination because of her pregnancy, and thus "because of sex," and thus unlawful under Title VII? She said it did. She said that the real reason she was fired was that her supervisor believed that she would not return to work after maternity leave. The firing could not be based on her tardiness, she said, because she clearly would not be tardy while on maternity leave (because she would not be working) and she would not be tardy when she returned from maternity leave (because she would not be suffering morning sickness). They fired her after the last moment that tardiness could be an issue.

The court rejected this argument, because of its understanding of the second clause of the PDA. Even if they fired her because they thought she would not come back after maternity leave, there is no violation of the PDA:

> "We must decide whether a termination so motivated is discrimination within the meaning of the pregnancy amendment to Title VII.
>
> "Standing alone, it is not. . . . Suppose that Lord & Taylor had an employee named Jones, a black employee scheduled to take a three-month paid sick leave for a kidney transplant; and whether thinking that he would not return to work when his leave was up or not wanting to incur the expense of paying him while he was on sick leave, the company fired him. . . . [T]he company could not be found guilty of racial discrimination unless . . . there was evidence that it failed to exhibit comparable rapacity toward similarly situated employees of the white race. We must imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave. If Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it."

That is, Troupe failed to present any evidence that the employer treated her any worse than it would have treated a similarly situated non-pregnant employee who was similar in his ability to work.

> "Troupe would be halfway home if she could find one nonpregnant employee of Lord & Taylor who had *not* been fired when about to begin a leave similar in length to hers. She either did not look, or did not find."

In the absence of such evidence, the court said, her case is doomed. The lesson under the PDA:

> "Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees."

Similarly, in *Ahmad v. Loyal American Insurance Co*., 767 F. Supp. 1114 (S.D. Ala. 1991), a federal district court found no PDA violation when the employer withdrew an employment offer after discovering that the applicant was pregnant. The employer demonstrated to the court that it had an immediate need to relieve a burden in a particular department. The applicant would not have had time to learn her job sufficiently before going out on maternity leave to be valuable when she got back. The whole thing would take too long. A non-pregnant applicant similarly disabled would have been rejected, the court found.

1993: Congress Enacts the Family and Medical Leave Act

The Family and Medical Leave Act, enacted by Congress in 1993, provides protections for pregnant employees beyond the protections of the PDA.

The FMLA allows eligible employees[3] of covered employers[4] to take up to 12 weeks of unpaid leave (or to substitute accrued vacation and sick leave) for a defined set of reasons, and to have their jobs waiting for them when they return.[5]

In the most common case, the right to FMLA leave arises as a result of the need to provide care for a "serious health condition" of the employee, or of the employee's parent, spouse, or child. The regulations under the FMLA attempt to put meat on the FMLA's "serious health condition" bones by setting out the conditions under which a mental or physical impairment arises to the level of a serious health condition. There are two principal ways in which an employee (or the parent, spouse, or child) may qualify as having a serious health condition. First, the employee (or the parent, spouse, or child) has incurred over-night inpatient care in a health care facility—that is, stayed in the hospital overnight—and had subsequent treatment. No particular length of incapacity is required. Second, the employee (or the parent, spouse, or child), while not staying in the hospital overnight, has seen a health care provider and incurred a continuing regimen of treatment. This second kind is more common, of course, as it does not require an in-hospital stay. But it does require a period of incapacity lasting more than three days.

The FMLA has two special provisions regarding pregnancy and childbirth.

[3] An eligible employee is one who has worked for the employer for at least 12 months and has worked at least 1,250 hours in the past 12 months.
[4] All public agencies are covered employers, regardless of the number of employees employed. Private employers are covered employers if they employ 50 or more employees.
[5] Or a "substantially similar" job.

The first special FMLA pregnancy provision

The first FMLA pregnancy provision specifies that a pregnant employee is entitled to FMLA leave—that is, time away from work with the guarantee of not being fired—for any period of incapacity. It does not have to be as long as three days. It does not require an in-hospital stay or even treatment by a health care provider. Here is what the relevant regulation says, 29 CFR 825.120(a)(4):

> "An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days."

Further, the pregnant employee is entitled to take FMLA leave on an intermittent, as-needed basis. Here is what 29 CFR 825.202(b)(1) says:

> "A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness."

So under the FMLA, a pregnant employee is entitled to job-protected time off for periods of when she is unable to work, irrespective of whether in any particular such period she has received a doctor's care. And she is entitled to intermittent FMLA leave for short-term periods when she is unable to work.

The second special FMLA pregnancy provision

The second FMLA provision allows the new mother to take FMLA job-protected leave to bond with her new baby, even if there is no incapacity involved—that is, even if the mother and the baby are both healthy, still FMLA leave is available for up to 12 weeks (less any amounts that have been used during the pregnancy) after the birth of the child.

This FMLA provision applies fully to employees who are new fathers. If both the new mother and the new father are employees of the same employer, their total FMLA bonding time is not 24 weeks, but 12 between them.

The relationship of the PDA to the FMLA

As the earlier discussion indicates, the PDA does not require employers to treat pregnant employees more favorably that other employees who are "similar in their ability or inability to

work." As far as the PDA is concerned, for example, if an employer refuses to allow an employee to return to work after taking maternity leave, the possibility exists that no violation of law has occurred. In *McLaughlin v. W&T Offshore Inc*, 78 Fed. Appx. 334 (5th Cir. 2003), for example, the employer refused to allow the new-mother employee Rosa McLaughlin to return following maternity leave. The federal Fifth Circuit Court of Appeals held that the employer proved that its desire that McLaughlin not return was not related to her pregnancy. Instead:

> "[I]t was discovered that other employees could perform both their duties and McLaughlin's better and with fewer errors than McLaughlin could alone."

But the FMLA provides specific protections that the PDA does not. Under the FMLA, McLaughlin would have been entitled to return to her job.

2008: The Americans With Disabilities Act Amendments Act

The Americans With Disabilities Act has since 1990 prohibited discrimination in employment on account of an individual's disability, as long as the individual was a "qualified individual"—that is, someone who, without or without an accommodation, could perform the essential functions of the job.

From the first, courts held that pregnancy is in itself is not a disability.

Take, for example, *Gorman v. Wells Manufacturing Corp*., 209 F. Supp. 2d 970 (S.D. Iowa 2002), aff'd 340 F.3d 543 (8th Cir. 2003). In one month, pregnant employee Leelyn Gorman missed eight days of work, was 25 minutes late for work one day and four hours late another. Pursuant to her employer's policy, she presented a disability certificate from her doctor for the absence. The doctor who signed the disability certificate later informed the employer that he had not asked Gorman to stay home; he did not know of any disability complications during the days in question; and that Gorman had been warned by his office about malingering. Gorman was then fired. She sued, alleging a violation of the ADA. The court ruled in favor of the employer. It noted the status of the regulations under the ADA as they then stood:

> "Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments" 29 C.F.R. 1630.2(h). Moreover, "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities" 29 C.F.R. § 1630.2(j)

The court said that it would join most other courts in saying that the normal kinds of conditions that accompany pregnancy, being temporary and short-term, are not disabilities protected by the ADA. Only when a disability rises far above the normal range of pregnancy problems, the court said, does a question of ADA-protected disability arise.

But in 2008 Congress, reacting to court decisions reading the ADA narrowly, enacted the Americans With Disabilities Amendments Act, providing, among other things, that there is no requirement that an impairment last a particular length of time to be considered a disability within the meaning of the ADA. With this change, conditions related to pregnancy have a much greater chance of being considered "disabilities." Further, the ADAAA provided that difficulties affecting major bodily functions (neurological, musculoskeletal, endocrine, and reproductive systems) can be, in themselves, covered "disabilities" without adversely affecting other major life activities.

Not many courts have had occasion to apply the ADAAA changes in pregnancy cases, but several have noted the possibility. See, for example, *Heatherly v. Portillo's Hot Dogs, Inc*. 2013 WL 3790909 (N.D. Ill. 2013), where the court (though holding for the defendant), noted the plaintiff's argument:

> She argues that this condition rendered her disabled under the ADAAA. Specifically, she argues that the recent amendments to the ADAAA support this conclusion because the Americans with Disabilities Act Amendments Act of 2008 (the "ADAAA") relaxed the duration and severity requirements for qualified disabilities.

In an Enforcement Guidance: Pregnancy Discrimination and Related Issues, https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm the EEOC sets out its interpretation that the ADA, after enactment of the ADAAA, applies more fully to pregnancy-related conditions.

2015 Supreme Court Pronouncement

The U.S. Supreme Court turned its attention to the PDA most recently in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015). Peggy Young was a UPS driver. Drivers must be able to lift packages of up to 70 pounds. Her doctor put her on lifting restriction of 20 pounds. UPS said she could not work while under the restriction.

Young said, Hey, you have previously granted accommodations to drivers who could not do their driver job because they

- were injured on the job
- had ADA disabilities
- lost their Department of Transportation certificates.

I can't do my driver job because of my pregnancy-related lifting restriction. By not accommodating me, you are engaged in disparate treatment against me because of my pregnancy. You are violating the PDA.

UPS said, Yeah we have granted accommodations in those limited categories: injured on the job, ADA disabilities, and lost certificates. But Young fits none of those categories. Instead, she is like everybody else, pregnant or not, and we have not accommodated them. Therefore, she is being treated "the same . . . as other persons," just not on-job, ADA, and lost-certificate people.

Young says, No. If you grant accommodations to anyone who is unable to regularly work, then you must grant similar accommodations to all pregnant employees not able to regularly work.

UPS says, No, all the PDA says is that pregnancy discrimination is a part of sex discrimination.

So, under the second clause of the PDA (as discussed above), who is right? The U.S. Supreme Court said both Young and UPS were wrong.

Young is wrong, the Court said, because pregnancy is not in "a most-favored-nation status." That is, it's not sufficient to find a PDA violation that Young can point to a set of employees who in fact were accommodated and say, "If you did it for them, you must do at least as well for pregnant employees." If an employer has legitimate, non-pretextual, nondiscriminatory reasons, it may implement policies that harm a class of employees, so long as it is not motivated by an intent to harm that class.

So, how can you as a pregnant employee who is not accommodated as well as some other employees have been, demonstrate that the employer was motivated by an intent to harm you? You follow the traditional Title VII *McDonnell Douglas* "burden shifting framework," the Court said. You make out a *prima facie* case by showing that

- you belong to protected class
- you sought accommodation
- the employer did not accommodate
- the employer did accommodate others "similar in their ability or inability to work."

If you show those things, then the employer may justify its refusal to accommodate by legitimate, nondiscriminatory reasons" [other than it's more expensive or less convenient to add pregnant women to list who will be accommodated.]

Then the burden shifts back to you to show pretext. You do that by showing that you are burdened and that the burden is sufficiently strong to, in light of the reasons offered by the employer, give rise to an inference of intentional discrimination. That could come by showing that the employer accommodates a large percentage of nonpregnant employees while failing to accommodate a large percentage of pregnant employees.

In this case, the Supreme Court applies a very traditional Title VII proof scheme to the question of accommodations under the PDA.

Recent Cases

Here is a look at a couple of recent pregnancy-discrimination cases.

Failure to Hire Because of Pregnancy

The PDA's second clause can come into play in cases in which an applicant claims that she was not hired because of her pregnancy.

As discussed on page 5, in *Ahmad v. Loyal American Insurance Co*., 767 F. Supp. 1114 (S.D. Ala. 1991), a federal district court found no PDA violation when the employer withdrew an employment offer after discovering that the applicant was pregnant. The employer demonstrated to the court that it had an immediate need to relieve a burden in a particular department. The applicant would not have had time to learn her job sufficiently before going out on maternity leave to be valuable when she got back. The whole thing would take too long. A non-pregnant applicant similarly disabled would have been rejected, the court found.

There is a problem in applying this analysis to failure-to-hire cases, despite the fact that the analysis was applied in *Ahmad*. Simply asking applicants about whether they are pregnant or plan to start a family has itself been found to be sex discrimination, since it is asked of women and not men. See, for example, *Nelson v. Wittern Group, Inc,* 140 F. Supp. 2d 1001 (S.D. Iowa 2001)

The analysis is still occasionally used, however. A recent example is *Thomas v. Monroe County Sheriff's Department*, 2016 WL 5390860 (E.D. Mich. 2016). Christine Thomas had been a sheriff's deputy. She was laid off as a deputy, along with others, in a budget crunch, but she was put into the lower position of corrections officer. When rehiring of deputies started up, she was pregnant and on light duty in her corrections officer position. She applied for deputy but was not hired. She was the most senior laid off former deputy not hired back. The sheriff said, when considering her, "What good is she going to do us?"

The court reasoned that what the sheriff said can mean either of two things: (1) "She is no good to us because she is pregnant" or (2) "She is no good to us because she is on light duty and we need a deputy on the road right now." If it is the first one, it is a PDA violation. If it is the second one, it is not a PDA violation if the sheriff would not have hired anyone who was currently incapable of road duty. It's up to the jury to decide which one is the real meaning, the court said.

Failure of accommodation

In *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017), Stephanie Hicks was a detective in the police department. When she became pregnant, she was allowed to work on cases that would avoid night and weekend work. Her lieutenant admitted that that arrangement bothered the lieutenant.

Hicks went on FMLA leave. Eight days after returning, she was demoted to patrol officer. She presented a letter from her doctor saying that the ballistic vest that patrol officers must wear would interfere with her lactation needs. She was told that the department would accommodate her needs by allowing two lactation breaks a day and by allowing her to not wear the vest. She said that not wearing the vest while on patrol would be dangerous and she resigned.

She sued alleging retaliation for taking FMLA leave and violation of the PDA. The jury awarded her $374,000. The city appealed.

The federal Eleventh Circuit Court of Appeals said:

> "The evidence taken in the light most favorable to Hickes provides ample evidence that Hicks was both discriminated against on the basis of her pregnancy and that she was retaliated against for taking her FMLA leave."

There is no requirement under the PDA that special accommodations be made for breastfeeding, the court said. But Hicks merely requested accommodations of the kind that other employees have had, and the failure to make those accommodations, the jury could find, amounted to a PDA violation. ("The line between discrimination and accommodation is a fine one. Taking adverse actions based on a woman's breastfeeding is prohibited by the PDA but employers are not required to give special accommodations to breastfeeding mothers."). Given that there was sufficient evidence to support the jury verdict, it stands.