Bender's Labor & Employment Bulletin

March 2018
VOLUME 18 • ISSUE NO. 3

Inside This Issue

LexisNexis™
Matthew Bender®

First Circuit Affirms City of Providence Is Liable for Fire Department Ablaze with Sexual Harassment

By Alexander P. Berg

Introduction

In *Franchina v. City of Providence*,[1] a lesbian firefighter in Rhode Island who was exposed to repeated gender epithets and sexual advances, insubordination and attempts to actively undermine her by her male direct reports, and even sprayed with blood and brain matter by one of her co-workers, was permitted to keep the substantial jury verdict in her favor. The case represents the First Circuit's first reported opinion on sex discrimination involving LGBTQ employees since the Seventh Circuit concluded last year that sexual orientation discrimination is sex discrimination. It also offers a useful reminder of what can happen when co-workers and employers do *not* work sufficiently hard to maintain a work environment free from harassment and discrimination.

A Primer on Sex Discrimination

Under Title VII of the Civil Rights Act of 1964, covered employers may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[2] Notably, Congress did not define the term "sex." The Supreme Court has repeatedly explained, though, that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[3]

That does not mean, however, that *all* members of one sex must be exposed to different "terms or conditions of employment" than all

[1] No. 16-2401, 2018 U.S. App. LEXIS 1919 (1st Cir. Jan. 25, 2018).

[2] 42 U.S.C. § 2000e-2(a)(1); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) ("[G]ender must be irrelevant to employment decisions.").

[3] *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993)) (Ginsburg, J., concurring).

continued on page 67

CONTENTS:

ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to:

N. Peter Lareau
61113 Manhae Lp.
Bend, Oregon 97702
E-mail: nplareau@gmail.com

or

Mary Anne Lenihan
Legal Editor
Bender's Labor & Employment Bulletin
LexisNexis Matthew Bender
230 Park Avenue, 7th Floor
New York, NY 10169
E-mail: maryanne.lenihan@lexisnexis.com

If you are interested in writing for the BULLETIN, please contact N. Peter Lareau via e-mail at nplareau@gmail.com or Mary Anne Lenihan via e-mail at maryanne.lenihan@lexisnexis.com.

A NOTE ON CITATION:

The correct citation form for this publication is:
18 Bender's Lab. & Empl. Bull. 65 (March 2018)

ISBN 978-0-8205-5039-8, EBOOK ISBN 978-1-4224-8015-1

(Pub. 1239)

First Circuit Affirms City of Providence Is Liable for Fire Department Ablaze with Sexual Harassment
By Alexander P. Berg

(text continued from page 65)

members of the other sex for sex discrimination claims to lie.[4] Nor must harassing behavior be "motivated by sexual desire to support an inference of discrimination on the basis of sex."[5] Of course, an employer that decides to discipline a female employee because she is female, or an employer who terminates a male employee for violating a workplace policy but merely warns a female employee for committing the same violation of the same policy has engaged in sex discrimination. In other words, as a general rule, "if [a court] asked the employer at the moment of the [employment] decision what its reasons were," and if "one of [the truthful] reasons [given] would be that the applicant or employee was a woman[,]" the employer will be liable under Title VII.[6] But courts have recognized several variations on this theme, including (1) "sex-plus" discrimination, (2) sexual stereotyping, and (3) sexual orientation discrimination.

"Sex-Plus" Discrimination

"'[S]ex-plus claims' are a flavor of gender discrimination claims where 'an employer classifies employees on the basis of sex *plus* another characteristic."[7] In *Phillips v. Martin Marietta Corporation*,[8] for instance, which was decided just seven years after the enactment of Title VII, a unanimous Supreme Court held that an employer could not lawfully refuse to hire women with pre-school-age children while simultaneously hiring men with pre-school-age children.[9]

Sex Stereotyping Discrimination

Twenty-five years after Title VII became law, the Supreme Court confirmed that employment decisions that are the results of sex stereotyping also violate the law's prohibition against sex discrimination. In *Price Waterhouse v. Hopkins*,[10] an accounting firm refused to consider one of its female senior managers for partnership based, in large part, on stereotypes about how a woman should appear and act. Ann Hopkins was criticized for being "overly aggressive," "macho," and "using foul language," and was encouraged to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[11]

Acting pragmatically, the *Price Waterhouse* Court observed that, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at *the entire spectrum of disparate treatment of men and women resulting from sex stereotypes*."[12] Therefore, the Court explained, "we are beyond the day when an employer [can] evaluate employees by assuming or insisting that they match the stereotypes associated with their group."[13] Several federal appellate circuits have since adopted the *Price Waterhouse* rationale in the context of sex stereotyping claims affecting LGBTQ employees.[14]

---

[4] *See, e.g.*, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) ("The effect of [Title VII] is not to be diluted because discrimination adversely affects only a portion of the protected class.").

[5] *Oncale*, 523 U.S. at 80.

[6] *Price Waterhouse*, 490 U.S. at 250 (plurality opinion).

[7] *Franchina v. City of Providence*, 2018 U.S. App. LEXIS 1919, at *38 (1st Cir. Jan. 25, 2018) (quoting *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009) (quoting 1 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law* 456 (3d ed. 1996) (emphasis in original)).

[8] 400 U.S. 542 (1971).

[9] 400 U.S. at 543.

[10] 490 U.S. 228 (1989).

[11] 490 U.S. at 235.

[12] 490 U.S. at 251 (quoting *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis added); *see also Oncale*, 523 U.S. at 79-80 (extending Title VII's prohibition on sex discrimination to same-sex harassment and reasoning that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed").

[13] *Price Waterhouse*, 490 U.S. at 251; *see also id.* at 282 (O'Connor, J., concurring) ("[E]mployment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females.").

[14] *See, e.g.*, *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (Equal Credit Opportunity Act case); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291-92 (3d Cir. 2009); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Gilbert v. Country Music Ass'n, Inc.*, 432 F. App'x 516, 519 (6th Cir. 2011); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Violence Against Women Act case); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007); *Glenn v. Brumby*, 663 F.3d 1312, 1314-17 (11th Cir. 2011).

Sexual Orientation Discrimination as Sex Discrimination

The Supreme Court has yet to decide the issue of whether Title VII bars discrimination based on one's sexual orientation as sex discrimination, expressly declining the opportunity to do so earlier this Term.[15] Federal appellate courts, meanwhile, are split over whether sexual orientation discrimination is unlawful.

It remains the law in the First Circuit that "Title VII does not proscribe harassment simply because of sexual orientation."[16] The Third,[17] Fourth,[18] Fifth,[19] Sixth,[20] Eighth,[21] Ninth,[22] Tenth,[23] Eleventh,[24] and D.C. Circuits[25] are aligned with this view.

However, last year the Seventh Circuit held in *Hively v. Ivy Tech Community College*[26] that "discrimination on the basis of sexual orientation *is* a form of sex discrimination."[27] The Second Circuit may be poised to follow the *Hively* rationale,[28] although as of the time of this writing, it remains precedential that "Title VII does not proscribe discrimination because of sexual orientation."[29]

The *Franchina* Decision

Facts

Portending the outcome of the appeal, the First Circuit began by observing that, "[t]hough the City attempts to trivialize the abuse inflicted upon Franchina while working for the Department by giving it short shrift in its brief, we decline to be as pithy in reciting Franchina's plight[.]"[30]

Lori Franchina was a lieutenant firefighter who was hired in 2002 at the North Main Street Fire Station in Providence, Rhode Island. She worked incident-free for the first four years.[31] Indeed, as she informed the jury during her trial testimony, a number of members of the Fire Department actually "took her under their wings," including shielding her from drunk male colleagues.[32] In addition, if anything, Franchina's greatest worry during this period was that she was rising through the ranks of leadership too quickly, from Rescue Technician to Acting Rescue to Rescue Lieutenant.[33]

That all changed in 2006. That year, Franchina was assigned to work a shift with Andre Ferro, with Ferro responsible for driving the rescue vehicle while Franchina was the acting rescue lieutenant. As the court scathingly observed, this was not its first run-in with Ferro, who had a lengthy history of sexually harassing his female colleagues. In 2001, for example, the court affirmed a separate judgment where the City of Providence was liable for Ferro commenting that another female firefighter's chest was "stacked," referring to her breast size; suggesting that she would "never want another man" if she had sex with him; and "forced her to listen to his musings on different sexual positions he enjoyed and his love of oral sex, played videos of himself having sex with his girlfriend in front of

---

[15] *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017).

[16] *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) (citations omitted); *see also Maldonado-Catala v. Naranjito*, 876 F.3d 1, 11 n.12 (1st Cir. 2017).

[17] *Bibby v. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *see also Prowel*, 579 F.3d at 289.

[18] *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996); *see also Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996); *Murray v. N.C. Dep't of Pub. Safety*, 611 F. App'x 166, 166 (4th Cir. 2015).

[19] *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 326-27 & n.1 (5th Cir. 1978); *see also Brandon v. Sage Corp.*, 808 F.3d 266, 270 n.2 (5th Cir. 2015).

[20] *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006); *see Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012).

[21] *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam).

[22] *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002).

[23] *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *see also Larson v. United Air Lines*, 482 F. App'x 344, 348 n.1 (10th Cir. 2012).

[24] *Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1510 (11th Cir. 1997).

[25] *See HUD v. Fed. Labor Relations Auth.*, 964 F.2d 1, 2 (D.C. Cir. 1992) (assuming, without deciding, that "Title VII does not cover sexual orientation").

[26] 853 F.3d 339 (7th Cir. 2017) (en banc).

[27] 853 F.3d at 341.

[28] *See Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017), *reh'g en banc granted*, 2017 U.S. App. LEXIS 13127 (2d Cir. May 25, 2017).

[29] *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); *see Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005); *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 200-01 (2d Cir. 2017).

[30] 2018 U.S. App. LEXIS 1919, at *2.

[31] 2018 U.S. App. LEXIS 1919, at *2-3.

[32] 2018 U.S. App. LEXIS 1919, at *3.

[33] 2018 U.S. App. LEXIS 1919, at *3-4.

her, and discussed his sexual prowess and stamina."[34] Nevertheless, as the court pointed out, Ferro *remained employed* by the City even after these incidents.[35]

It soon became clear during their first shift together that Ferro, sadly, had not changed his ways. During his very first encounter with Franchina, Ferro approached her and asked if she was a lesbian, then followed up this "charming" introduction by commenting, "I don't normally like to work with women; but, you know, we like the same thing, so I think we're going to get along."[36] While in the fire engine, Ferro asked Franchina if she would like to have children and offered to "help [her] with that[.]"That same shift, while at the Rhode Island Hospital tending to an emergency, Ferro approached Franchina in view of medical staff, patients, and their colleagues and, while rubbing his nipples in a circular manner, screamed at his co-worker, "My lesbian lover! How are you doing?"[37] Ferro then intruded (apparently intentionally) on Franchina without knocking while she was changing out of her uniform in the fire station quarters. Only when Franchina told Ferro to "get the fuck out" a third time did her colleague leave her alone.[38]

Though Franchina did not report these incidents directly, the Chief of the Department had "gotten wind" of what transpired and filed a written complaint against Ferro seeking his termination. Ferro was, in fact, fired in 2007. The Department, however, rehired him in 2008.[39]

Other firefighters did not take kindly to Franchina after the Ferro run-in, however. Andy McDougal, another of Franchina's subordinates who was also responsible for food preparation for everyone at the fire station, yelled at her in front of their captain, "What[,] are you trying to get him fucking fired?" in reference to Ferro. McDougal also refused to cook meals for Franchina and, when ordered to do so, apparently began poisoning her food. Franchina testified that, though she had never had digestive issues before, she repeatedly became severely ill when eating McDougal's meals. Indeed, when she decided to swap her meal one time with another technician, the technician became violently sick.[40]

McDougal and others also used a wide array of crude sexual epithets when talking and/or writing about Franchina, including vulgarities such as "bitch," "cunt," "lesbo," and "Frangina," a mashup of "vagina" and the technician's last name.[41] So vitriolic was much of the hostility directed at Franchina by her colleagues', and so eager were they to undermine her, that they engaged in deeply troubling patient-related behavior. In a 2007 incident, Franchina and her team were dispatched to help a pregnant mother experiencing fetal distress. Franchina ordered McDougal to help get oxygen to the mother and fetus, but he intentionally let the re-breather device slip off the woman's nose and mouth. Things got to the point where Franchina had to intervene to secure the oxygen path for herself.[42]

The City transferred Franchina from its North Main Street station to its Branch Avenue station, but the problems persisted there. Another firefighter purposely failed to place a wheelchair aboard Franchina's fire engine when she was called upon to respond to a patient with cerebral palsy.[43] Similarly, after a bad car crash in which one of the victims lost a portion of his scalp, Franchina urgently requested a driver to transport the victim to the hospital, but nobody budged. Instead, another lieutenant responded, "You'll get a driver when you get your driver." The crash victim died.[44]

Perhaps most graphically, when responding to a suicide-attempt victim who had shot himself in the head, three of Franchina's colleagues refused her orders on four separate occasions to move the victim to a chair. Eventually, Franchina enlisted the assistance of a police officer on the scene to do what her own subordinates should have been doing. Paul Tang, a Rescue Technician and one of these insubordinate team members, then administered CPR to the victim. When he was done, he removed the gloves he was wearing – which were now "severely encrusted with blood and pieces of brain matter" – and snapped them off, "fling[ing] the bloody debris onto Franchina's face, nose, hair, neck, eyes, ears, and mouth."[45] Unsurprisingly, Franchina took six months' disability leave after this incident.

Following her return from leave, Franchina was berated by 6'6" male firefighter Sean McGarty at a department Christmas party. McGarty blocked the door as Franchina was trying to leave and spat obscenities at her, calling her a "fucking doughnut," "fucking zero," and "fucking loser." When Franchina asked two senior officers who were standing nearby for help, one responded unhelpfully,

[34] 2018 U.S. App. LEXIS 1919, at *4 & n.4 (discussing *O'Rourke v. City of Providence*, 235 F.3d 713, 718 (1st Cir. 2001)).

[35] 2018 U.S. App. LEXIS 1919, at *4 n.4.

[36] 2018 U.S. App. LEXIS 1919, at *5.

[37] 2018 U.S. App. LEXIS 1919, at *7.

[38] 2018 U.S. App. LEXIS 1919, at *7-8.

[39] 2018 U.S. App. LEXIS 1919, at *8 & n.5.

[40] 2018 U.S. App. LEXIS 1919, at *9.

[41] 2018 U.S. App. LEXIS 1919, at *1, 9, 12 (citing *Frangina*, Urban Dictionary, https://www.urbandictionary.com/define.php?term=Frangina (last visited Jan. 25, 2018)).

[42] 2018 U.S. App. LEXIS 1919, at *11.

[43] 2018 U.S. App. LEXIS 1919, at *13.

[44] 2018 U.S. App. LEXIS 1919, at *13.

[45] 2018 U.S. App. LEXIS 1919, at *14.

"I'm not your fucking baby-sitter."[46] Franchina then enlisted the assistance of the courts, obtaining a temporary restraining order and then a preliminary injunction against McGarty. McGarty, however, violated the injunction at least four times.[47]

On her last day physically in the office as an active-duty rescue lieutenant, Franchina overheard several male colleagues "making fun of her and loudly exclaiming, 'Do you know who was in the fucking station today? That bitch was in the station.'" Franchina reported this incident, but no corrective action occurred. Franchina was subsequently placed on injured-on-duty (IOD) status, where she continued to serve for three years while working remotely. On the rare occasions she needed to be in the station, Franchina was still met with "greetings" such as "[t]he bitch is in the house," and "F that bitch . . . thank God she's not here anymore."[48]

All told, as the court noted, "[b]y the time Franchina officially retired" in late 2013, "she had submitted approximately *forty* different written statements complaining of harassment, discrimination, and retaliation to higher-ups in the Department."[49] Franchina subsequently filed a charge of discrimination and, later, a lawsuit raising both retaliation and gender-based hostile work environment claims under Title VII.[50]

At her jury trial, Franchina testified at length and presented corroborating testimony from several other female employees. These former colleagues testified that, within the Department, women were: considered "less competent" than men and "spoken to as if they have no authority"; often blamed by leadership for voicing grievances, rather than having the underlying allegations addressed; and treated better by their male colleagues if they had dated or been "intimately involved" with them, relative to those who had not.

Following eight days of testimony, the jury found in Franchina's favor and awarded her punitive, emotional, and front pay damages.[51] The district court subsequently struck the punitive damages and modified the front pay award to give Franchina $545,000,[52] as well as over $180,000 in attorney's fees and costs.[53] The City appealed.

[46] 2018 U.S. App. LEXIS 1919, at *16.
[47] 2018 U.S. App. LEXIS 1919, at *16-17.
[48] 2018 U.S. App. LEXIS 1919, at *18-19.
[49] 2018 U.S. App. LEXIS 1919, at *19.
[50] 2018 U.S. App. LEXIS 1919, at *19-20.
[51] 2018 U.S. App. LEXIS 1919, at *20.
[52] 2018 U.S. App. LEXIS 1919, at *48-59.
[53] *Franchina v. City of Providence*, C.A. No. 12-517-M-LDA, 2016 U.S. Dist. LEXIS 155083 (D.R.I. Nov. 7, 2016).

The First Circuit's Decision

In a published opinion, the appellate panel unanimously affirmed the judgment. In doing so, the court "declined to put out flames of the Department's own making."[54] Analyzing the sufficiency of the evidence in support of Franchina's gender discrimination claim, the court rejected the City's argument that Franchina was "required to have presented evidence at trial of a comparative class of gay male firefighters who were *not* discriminated against" in order to maintain her "sex-plus" discrimination claim.[55] As the court aptly noted, under the City's approach, employers would be able to "discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender[,]" e.g. discriminating against women with children but not employing any fathers.[56] In addition, the court explained that "the City's approach [would] require Franchina to make a showing that, all else being equal (the 'plus' factors being the same), the discrimination would not have occurred but for her gender."[57] This argument could not be squared with the statutory language that sex may not be "*a* motivating factor" (as opposed to "*the* motivating factor").[58] In short, the Court concluded, "sex-plus 'does not mean that more than simple sex discrimination must be alleged.'"[59]

Reviewing the trial evidence, the court had no difficulty concluding that Franchina had established "sex-plus" discrimination. Acknowledging that it was still "true" in the First Circuit that "Title VII does not proscribe harassment based solely on one's sexual orientation,"[60] the Court concluded that precedent did not "foreclose a plaintiff in our Circuit from bringing sex-plus claims under Title VII where, *in addition to the sex-based charge, the 'plus' factor*

[54] 2018 U.S. App. LEXIS 1919, at *2.
[55] 2018 U.S. App. LEXIS 1919, at *38-39 (emphasis in original).
[56] 2018 U.S. App. LEXIS 1919, at *39 (citing *Chadwick*, 561 F.3d at 41); *see id.* at *39 n.17 (noting that black women may not be targeted as a subgroup and citing *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980)).
[57] 2018 U.S. App. LEXIS 1919, at *40.
[58] 2018 U.S. App. LEXIS 1919, at *40-41 (quoting 42 U.S.C. § 2000e-2(m)) (emphasis added); *see also Price Waterhouse*, 490 U.S. at 240 (rejecting "but-for" causation under Title VII discrimination claims).
[59] 2018 U.S. App. LEXIS 1919, at *41 (quoting *Chadwick*, 561 F.3d at 43).
[60] 2018 U.S. App. LEXIS 1919, at *42 (citing *Higgins*, 194 F.3d at 258-59).

is the plaintiff's status as a gay or lesbian individual."[61] Therefore, even though sexual orientation discrimination is not considered sex discrimination *per se* in the First Circuit, a plaintiff may prevail by showing that, as a lesbian female, she was treated differently from her heterosexual female counterparts.

The court then held that Franchina had adduced "a plethora of evidence" of sex-based discrimination, including sexual remarks and innuendos directed toward her, derogatory gender-based epithets such as "cunt" and "bitch[,]" and evidence that female coworkers were treated better when they had slept with their male colleagues relative to those who kept to strictly professional relationships and friendships.[62]

The court also rejected a variety of challenges by the City to the trial court's jury instructions, evidentiary rulings, and damages award.[63] The City now has until April 25, 2018 to petition the Supreme Court for *certiorari*.[64]

Implications for Practitioners

The depravity of the work environment Lori Franchina encountered over the course of seven years is enough to set off alarm bells in many employment practitioners' heads. The opinion offers several helpful reminders to mitigate future risks with your clients, however:

- "Jump down the firefighter's pole" whenever you receive complaints of workplace harassment or discrimination. Not every complaint will be meritorious, but every complaint should be taken seriously and promptly investigated. When conducting the investigation, be sure to speak with at least the complainant and the alleged bad actor, and remember that you may not retaliate against anyone because of their cooperation with and/or participation in the investigation.
- The lateral transfer of an employee may be worthwhile in avoiding a future hostile work environment, but taking that action alone is not a guarantee to solve all future problems.
- Do not be afraid to discipline or terminate "bad apples." The First Circuit appropriately excoriated the City for failing to correct (including rehiring) Andre Ferro despite his highly inappropriate and repeated conduct.

Alex Berg is an associate with Kollman & Saucier, a metropolitan Baltimore law firm representing management in all areas of labor and employment law. Before joining the firm, Alex served as a judicial law clerk on the Maryland Court of Special Appeals and the D.C. Superior Court.

[61] 2018 U.S. App. LEXIS 1919, at *42 (emphasis added). The Court further noted that the *Higgins* Court "expressly disclaimed reaching a conclusion on that issue." *Id.* at *42-43 (citing *Higgins*, 194 F.3d at 260).

[62] 2018 U.S. App. LEXIS 1919, at *43-44.

[63] *See* 2018 U.S. App. LEXIS 1919, at *21-37, 45-59.

[64] *See* Sup. Ct. R. 13 (giving parties 90 days from the entry of judgment to file *cert.* petition).

Fourth Circuit Joins the Third and Tenth Circuits Holding that Employers Must Provide Reasons that Explain Wage Disparity under the Equal Pay Act

By: Elizabeth Torphy-Donzella and Paul Burgin

Introduction

It is not uncommon for companies to be accused of unlawfully discriminating based on gender. What companies may not know, however, is that the employer's burden in defending its challenged action is much heavier when defending a claim under the Equal Pay Act ("EPA") than it is when defending a claim under Title VII of the Civil Rights act of 1964.[1]

The Equal Pay Act ("EPA"), which amended the Fair Labor Standards Act ("FLSA"), prohibits sex-based wage discrimination for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[2] An employer in violation of the EPA may not reduce the wage rate of an employee to come into compliance with the EPA.[3]

The jobs in comparison need not be identical to be considered "equal work."[4] Rather, jobs may be "substantially equal" to fulfill the "equal work" standard.[5] Job content, not job titles or classifications, determines whether jobs are substantially equal.[6] Pay differentials, however, are permitted when they are based on: (1) a seniority system; (2) a merit system; (3) quantity or quality of production; and (4) a factor other than sex.[7]

This article will review the most recent court case addressing the burden-shifting framework applied when reviewing claims brought under the Equal Pay Act (*U.S. Equal Emp't Opportunity Comm'n v. Maryland Ins. Admin.* ("*Maryland Insurance Administration*")).[8]

Background

The Maryland Insurance Administration ("MIA") is an independent state agency that enforces Maryland's insurance laws. Consistent with the hiring and salary practices of Maryland's Department of Budget and Management, the MIA compensates its employees pursuant to a Standard Pay Plan Salary Schedule. When the MIA hires an employee, it assigns that employee a grade and step level, which in turn determines that person's salary. Each grade level contains a set base salary. Within each grade level are 20 separate steps. A "step" is a raise in salary.[9]

After the MIA designates a new employee's grade level, it assigns his or her step placement based on a variety of factors, including prior work experience, relevant professional designations, and licenses or certifications. When determining an employee's step level, the MIA also takes into consideration the difficulty in filling the position and any prior years of service of state employment. An employee laterally transferring within the Maryland government takes his or her grade and step to the new position.[10]

The MIA employed Alexandra Cordaro, Marlene Green, and Mary Jo Rogers as fraud investigators. Cordaro was hired in December 2009, and assigned to grade level 15, step four, with a starting salary of $43,495. Cordaro had prior work experience as a fraud investigator for a federal credit union for over two years, and as a criminal investigation and litigation paralegal for 12 years in the Baltimore County State's Attorney's Office. At the time of her resignation from the MIA after roughly five years, Cordaro was earning $49,916.[11]

In November 2010, the MIA hired Marlene Green and assigned her to grade level 15 step 4, with a starting salary of $43,759. Green held a bachelor's degree from Johns Hopkins University and had significant relevant prior work experience. Green worked for the Baltimore City Police Department for over 20 years, approximately 13 of which were in an investigative capacity. The year

[1] *U.S. Equal Emp't Opportunity Comm'n v. Maryland Ins. Admin.*, 879 F.3d 114, 121 and 121 n.7 (4th Cir. 2018) (hereinafter "*EEOC v. Md.*").
[2] 29 U.S.C. § 206(d)(1).
[3] 29 U.S.C. § 206(d)(1).
[4] 29 C.F.R. § 1620.13(a).
[5] 29 C.F.R. § 1620.13(a).
[6] 29 C.F.R. § 1620.13(e).
[7] 29 U.S.C. § 206(d)(1).
[8] *EEOC v. Md.,* 879 F.3d 114 (4th Cir. 2018).
[9] 879 F.3d at 116-17.
[10] 879 F.3d at 117.
[11] 879 F.3d at 117.

prior to joining the MIA, Green worked as an investigator for the United States Office of Personnel Management and the Office of the State's Attorney for Baltimore County. Green resigned from the MIA in February 2013, at which time her salary was $45,503.[12]

In July 2011, Mary Jo Rogers transferred to her position as a fraud investigator from another position within the MIA. Like her two counterparts, Rogers began her position as a fraud investigator possessing significant relevant prior work experience. Rogers had worked for eight years as a police officer and a detective for the Baltimore County Police Department. Rogers also previously worked for an insurance company as a special investigator and an adjuster. Rogers was assigned to grade level 15, step 5, with a starting salary of $46,268. Her salary had increased to $50,300 by November 2013.[13]

The District Court Decision

In 2014, Cordaro, Rogers and Green filed complaints against the MIA with the EEOC after they learned that their salaries were lower than those of four male fraud investigators. Subsequently, the EEOC filed suit on their behalf in the United States District Court for the District of Maryland against the MIA, alleging violations of the EPA.[14]

The EEOC identified Bruno Conticello, James Hurley, Donald Jacobs, and Homer Pennington as male comparators. Conticello, hired by the MIA in November 2010, held a bachelor's and master's degree in criminal justice and had nearly 20 years of investigative experience working for insurance companies and Maryland's Office of the Inspector General. He earned a Certified Fraud Examiner designation, and was assigned to grade level 15, step 10 when hired. His starting salary was $49,842, and by late 2012, his salary was $51,561.[15]

Hurley had ten years of insurance-related investigative experience, three of which were at the MIA, when the MIA re-hired him in November 2006. He also had worked as a claims adjuster for multiple insurance companies, and he too had earned a Certified Fraud Examiner designation. He was assigned to grade level 15, step 6, with a starting salary of $45,298. When he departed the MIA in October 2012, his salary was $49,678.[16]

Donald Jacobs was hired as a fraud investigator at the MIA in May 2007. He possessed 11 years as a Natural Resources Officer with the state of Maryland and had worked for three years as an investigator in the Office of the Public Defender in Baltimore, although is investigatory experience was not in the fields of fraud or white collar crime. He was assigned to grade level 15, step six, with a starting salary of $45,360. He left the MIA in May 2013, with a salary of $47,194.[17]

In August 2007, Homer Pennington was hired by the MIA as a fraud investigator, and assigned to grade level 15, step five, with a starting salary of $45,360. Pennington had worked in the criminal investigation unit of the Baltimore Police Department for approximately 22 years before joining the MIA and earned the designation of Certified Arson Investigator. When he left the MIA in May 2013, his salary was $47,194.[18]

The district court granted the MIA's motion for summary judgment, holding that the claimants failed to make a prima facie case.[19] The Court found that the EEOC failed to identify valid comparators, because the four male fraud investigators it had identified were hired at higher steps than the claimants. The district court further held that the MIA showed that the disparity in pay amongst the female claimants and male comparators was due to experience and qualifications.[20]

The EEOC's Arguments on Appeal

On appeal to the U.S. Court of Appeals for the Fourth Circuit, the EEOC challenged the validity of the district court's decision on two grounds. First, the EEOC contended that it had made a prima facie showing of an EPA violation because it identified four male fraud investigators who earned higher starting salaries than the three claimants despite the fact that the three female claimants performed identical work. Second, the EEOC argued that the MIA did not establish as a matter of law that the difference in pay between the female claimants and male comparators was due to credentials and prior work experience.[21]

The Fourth Circuit's Decision

A divided Fourth Circuit vacated the district court's grant of summary judgment in favor of the MIA, holding that: (1) the EEOC established a prima facie violation of the EPA; and (2) the MIA did not meet its "necessarily heavy" burden of proof in establishing its proffered affirmative defense that the pay disparity was due to factors other than gender.

With respect to establishing a prima facie case, the court first reviewed the burden-shifting framework utilized

[12] 879 F.3d at 117.
[13] 879 F.3d at 117-18.
[14] 879 F.3d at 118.
[15] 879 F.3d at 118.
[16] 879 F.3d at 118.
[17] 879 F.3d at 118.
[18] 879 F.3d at 119.
[19] 879 F.3d at 119.
[20] 879 F.3d at 119.
[21] 879 F.3d at 119.

when analyzing claims brought under the EPA. A plaintiff establishes a prima facie case under the EPA by demonstrating that his or her employer paid unequal wages to an employee of the opposite sex for equal work on jobs requiring equal skill, effort, and responsibility, performed under similar working conditions.[22] Once a plaintiff has made a prima facie showing, the burdens of production and persuasion shift to the employer to show that the wage disparity was justified by one of four affirmative defenses: (1) a seniority system; (2) a merit system; (3) quantity or quality of production; and (4) a factor other than sex. If the employer fails to establish as a matter of law that one or more affirmative defenses are applicable, it will not be entitled to summary judgment.[23]

The court continued that the burden on the employer to establish an affirmative defense as a matter of law is a "heavy one."[24] It distinguished this heavy burden from an employer's burden in a Title VII case, observing that "in a Title VII case, the employer need only proffer a legitimate, nondiscriminatory reason for the challenged action, and is not required to establish that the cited reason *in fact* motivated the employer's decision."[25] The court joined Third and Tenth Circuit precedent in holding that the EPA "requires that an employer submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons *could* explain the wage disparity, but that the proffered reasons *do in fact* explain the wage disparity."[26] To meet this heavy burden, an employer must "prove its affirmative defense so convincingly that a rational jury could not have reached a contrary conclusion."[27]

Turning to the case at hand, the Fourth Circuit held that, because each claimant earned less money than at least one identified male comparator performing substantially equal work as fraud investigators, the EEOC had satisfied its prima facie burden under the EPA. The court further explained that the MIA's argument that other male employees at the MIA performed substantially equal work but made less money than the claimants did not compel it to reach a conclusion to the contrary. To satisfy its prima facie burden, the EEOC "[wa]s not required to demonstrate that males, as a class, [w]ere paid higher wages than females, as a class, but only that there [wa]s discrimination in pay against an employee with respect to one employee of the opposite sex."[28]

The court was similarly unpersuaded by the MIA's contention that the male comparators were hired at higher step levels than at least one of the claimants because of superior experience, professional designations, and licenses or certifications. These factors, the court reasoned, were only relevant to the MIA's affirmative defenses, and not to whether the EEOC satisfied its prima facie burden.[29]

Following its determination that the EEOC had established a prima facie case, the court analyzed the merits of the MIA's affirmative defenses. The MIA asserted the affirmative defense that the Standard Salary Schedule and the comparators' experience and qualifications were gender-neutral justifications for the wage disparity. The court ruled that neither affirmative defense *required* a jury to conclude that it actually explained the wage disparities.[30]

The court reasoned that although the MIA's salary schedule used to assign salaries was facially neutral, the discretion exercised by the MIA in assigning employees to their initial designations on the schedule would permit a fact-finder to conclude that the MIA based its step assignment of the claimants on gender, at least in part. To obtain summary judgment, the MIA needed to prove "that the job-related distinctions underlying the salary plan, including prior state employment, *in fact* motivated the MIA to place the claimants and the comparators on different steps of the pay scale at different starting salaries."[31] Because there were fact issues as to motive, the MIA could not meet this burden and was not entitled to summary judgment.

With regard to the MIA's argument that the pay disparities were justified by the differences in the experience and qualifications of the comparators and claimants, the court similarly ruled that without evidence that the qualification differences *actually explained* the disparities, summary judgment was improper. Where, as here, the claimants each had extensive relevant experience, there was "an issue of fact for the jury to decide whether the MIA in fact objectively weighed the comparators' qualifications as being more significant than the claimants' qualifications."[32]

---

[22] 879 F.3d at 120 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974)).

[23] 879 F.3d at 120.

[24] 879 F.3d at 121.

[25] 879 F.3d at 121 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

[26] 879 F.3d at 121 (citing *Stanziale v. Jargowsky*, 200 F.3d 101, 107-08 (3d. Cir. 2000); *Mickelson v. N.Y. Life Ins. Co.*, 460 F.3d 1304, 1312 (10th Cir. 2006)).

[27] 879 F.3d at 121.

[28] 879 F.3d at 122.

[29] 879 F.3d at 122.

[30] 879 F.3d at 122.

[31] 879 F.3d at 123 (citing *Stanziale*, 200 F.3d at 107-08).

[32] 879 F.3d at 123.

The court determined that the MIA had adduced no evidence that compelled it to hold as a matter of law that the male comparators were awarded their respective starting salaries pursuant to their experience and qualifications. Ultimately, "a jury would not be compelled to find that the reasons proffered by the MIA were, in fact, the reasons for the disparity in pay awarded to the claimants and comparators." Based on this reasoning, the court concluded that the District court erred in granting summary judgment in favor of the MIA.[33]

The dissenting judge found that indisputably, "[t]he differences in pay identified by the EEOC [we]re all readily explainable by state policies crediting prior state employment and by differences in the experience and qualifications of the individuals involved."[34] Individuals with prior state employment were entitled to be placed in specific grades based on that prior experience, and state personnel law required that their prior service be credited, both of which determined starting pay. The objective application of these neutral factors, the dissent reasoned, sufficiently explained the wage disparities and summary judgement was, therefore, justified. The dissent opined that states tailor their compensation schemes based on the experience and qualifications of the individuals to attract and retain the most qualified individuals: "[t]he proposition is so obvious that to state it risks embarrassment."[35]

The dissent also concluded that ample evidence presented by the MIA demonstrated the wage disparities were due to the fact that the comparators had credentials and relevant experience that manifestly exceeded that possessed by the plaintiffs, and dubbed "[t]hese straightforward explanations" as "more than sufficient to foreclose an EPA claim against the agency."[36] The dissent concluded that the explanations provided did *in fact* explain the wage disparities, and as such, would have affirmed the district court's grant of summary judgment.[37]

Conclusion

As the Fourth Circuit's decision makes clear, the EPA is not an intent-based law. An employer that pays an employee of one gender less than an employee of the other gender may be found liable, regardless of motive, if the difference cannot be proven to be based on a factor other than sex. While a facially-neutral salary step/grade system normally will provide justification for pay differences, under the Fourth Circuit's holding, an employer "must present evidence that the job-related distinctions underlying the salary plan, including prior state employment, *in fact* motivated MIA to place the claimants and the comparators on different steps of the pay scale at different starting salaries."[38] Thus, although an employer may violate the law without an intent to do so, proof of motive (that the employer placed an employee in one grade over another based on the job-related distinctions between the grades) is required for the employer to show that there was no equal pay violation. In short, intent still matters.

In light of this (as well as the emergence of legislation intended to attack the perceived roots of pay discrimination),[39] employers would be wise to review their pay systems for differences that cannot be justified by gender-neutral factors. In addition, even where gender-neutral factors appear to justify the distinctions, employers should look more deeply to ensure that those factors are applied by decision makers in a gender-neutral fashion. As the Fourth Circuit decision instructs, failing to take this extra step may make the employer vulnerable to an after-the-fact determination that its facially neutral justifications do not hold up. All these activities should be undertaken with the assistance of legal counsel to avoid creating non-privileged analyses that may prove problematic if the employer is sued for pay discrimination.

Elizabeth is a partner and Paul Burgin is an associate at Shawe Rosenthal LLP, a management-side labor and employment law firm in Baltimore, MD.

[33] 879 F.3d at 123.

[34] 879 F.3d at 129 (Wilkinson, J. dissenting).

[35] 879 F.3d at 129 (Wilkinson, J. dissenting).

[36] 879 F.3d at 131 (Wilkinson, J. dissenting).

[37] 879 F.3d at 131 (Wilkinson, J. dissenting). The dissent also asserted that sovereign immunity should bar the claims. The dissent reasoned that the EEOC should not have been "able to bring a case as marginal as this one against a state[,]" as "state law provides remedies for gender discrimination in all its forms." 879 F.3d at 124 (Wilkinson, J. dissenting). The dissent maintained that a federal agency bringing a case in federal court challenging the state's personnel system, pursuant to federal law, usurped the power and interests of the state. 879 F.3d at 124 (Wilkinson, J. dissenting).

[38] 879 F.3d at 123 (emphasis in original).

[39] Laws making employee discussion of wage rates protected (so-called "pay transparence") and banning employers from making inquiries of applicants about salary have proliferated in recent years.

Supreme Court to Decide Constitutionality of Travel Ban

By Amanda M. Ghannam

Introduction

On January 19, 2018, the Supreme Court granted *certiorari* in *Trump v. State of Hawaii*[1], one of over fifty federal lawsuits filed in a flurry of litigation responding to President Donald J. Trump's controversial executive orders restricting immigration from certain countries. The case arises out of the latest presidential proclamation restricting the entry of nationals from Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela, and Yemen. Originally filing suit against the President in *Trump v. Hawaii* were the state of Hawaii, the Muslim Association of Hawaii, and three United States citizens or lawful permanent residents whose relatives in Syria, Iran, and Yemen sought visas.[2]

The Supreme Court will consider whether the President has overstepped his constitutional authority to suspend entry of certain foreign nationals under the relevant immigration statutes; whether the Ninth Circuit's injunction against this suspension is impermissibly overbroad; whether the President's latest proclamation unlawfully discriminates based on nationality; and whether the proclamation violates the Establishment Clause. The Court's decision may finally put to rest the stunning whirlwind of legislation and litigation around the travel ban that has ensued since the current President took office.

A Brief History of the Travel Ban

The subject of this litigation is Proclamation 9645, the latest iteration of what has become known colloquially as the "travel ban." Proclamation 9645 is the most recent in a series of executive orders regarding immigration and was ostensibly issued to ease the public outcry and stem the tide of litigation provoked by the President's initial versions of the ban, which had only restricted travel from Muslim-majority countries in the Middle East and North Africa region. For this reason, some civil rights groups refer to the set of Presidential decisions as a "Muslim ban." To understand the contours of Proclamation 9645, and the issues before the Supreme Court, some historical perspective is required.

Executive Order 13769

The first version of the travel ban, "Executive Order 13769: Protecting the Nation from Foreign Terrorist Entry into the United States"[3] was issued on January 27, 2017, just days after President Trump took office. Executive Order 13769 suspended the immigrant and nonimmigrant entry of nationals from Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen for 90 days. It also suspended the entire U.S. Refugee Admissions Program for 90 days and halted the admission of Syrian refugees indefinitely.[4]

Plaintiffs in Virginia, Maryland, Michigan, Oregon, California, Hawaii, Colorado, Georgia, the District of Columbia, Texas, New York, Illinois, Wisconsin, Massachusetts, Pennsylvania, Indiana, and Washington almost immediately filed suit against the President. Some cases were voluntarily dismissed, while others resulted in temporary restraining orders blocking enforcement of the Order's provisions. The State of Washington's case, which was later joined by the state of Minnesota, resulted in the greatest blow to the President's authority. That suit was brought on the grounds that the Executive Order violated the First and Fifth Amendments, the Immigration and Nationality Act, the Foreign Affairs Reform and Restructuring Act, the Religious Freedom Restoration Act, and the Administrative Procedure Act.[5] The district court granted the State of Washington's request for a temporary restraining order, finding that the Executive Order adversely affected the States' residents in areas of employment, education, business, family relations, and freedom to travel; that the harms extended to the States by virtue of their roles as *parens patriae* of the residents living within their borders; and that the States themselves were harmed.[6] The federal government unsuccessfully sought a stay of the temporary restraining order from the Ninth Circuit, and was thus enjoined from enforcing sections of the Executive Order across the nation.[7]

Executive Order 13780

In March 2017, the President revoked Executive Order 13769 and replaced it with Executive Order 13780, also

---

[1] No. 17-965, 2018 U.S. LEXIS 759 (U.S. Jan. 19, 2018).

[2] *Petition for Writ of Certiorari*, 2018 U.S. S. Ct. Briefs LEXIS 27, at *9 (Jan. 5, 2018) (hereinafter "Cert. Petition").

[3] 82 Fed. Reg. 8977.

[4] 82 Fed. Reg. 8977.

[5] *Washington v. Trump*, 847 F.3d 1151, 1157 (2017).

[6] *Washington v. Trump*, 2017 U.S. Dist. LEXIS 16012, at *7 (W.D. Wash. Feb. 3. 2017).

[7] *Washington v. Trump,* 847 F.3d 1151.

titled "Protecting the Nation from Foreign Terrorist Entry Into the United States." This new executive order was updated to respond to previous scrutiny and criticism from the courts[8] and clarified that the restrictions on travel were "not motivated by animus toward any religion," and that nationals from the seven countries warranted "additional scrutiny" because "the conditions in these countries present heightened threats."[9] Executive Order 13780 reduced the scope of the original travel ban, removing Iraq from the list and carving out exceptions for certain categories of foreign nationals such as lawful permanent residents, diplomats, and asylees. While it rendered many of the pending cases moot, this was not enough to deter the flow of litigation. Legal challenges in Hawaii, Washington, Maryland, and Virginia ensued. In Hawaii[10] and Maryland[11], federal district court judges again granted temporary restraining orders enjoining enforcement of the re-issued ban, finding that the plaintiffs had demonstrated a strong likelihood of success on their Establishment Clause claims. The Ninth Circuit partially upheld the Hawaii restraining order,[12] as did the Fourth Circuit in Maryland.[13]

However, in June 2017, the Supreme Court granted the federal government's petitions to stay the circuit courts' injunctions, allowing Executive Order 13780 to be enforced except with respect to foreign nationals who could show a "credible claim of a bona fide relationship with a person or entity in the United States."[14] To meet this standard, a national of one of the six countries must show a "close familial relationship" or one that was "formal, documented, or formed in the ordinary course" with an entity such as an employer or university.[15]

Proclamation 9645

Undeterred by the onslaught of litigation and judicial limitations against the travel ban, on September 27, 2017, President Trump issued Proclamation 9645, "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats."[16] The President revoked Executive Order 13780 and this time identified Somalia, Chad, Iran, Libya, North Korea, Syria, Venezuela, and Yemen as countries with "inadequate" identity-management protocols, information-sharing practices, and risk factors, claiming that the entry of their citizens would be "detrimental to the interests of the United States."[17] As such, the President suspended entirely the entry of all foreign nationals from North Korea and Syria, and placed strict limitations on entry of nationals from the other five countries.[18] Unlike previous iterations of the ban, this version established guidelines for consular officers and United States Customs and Border Protection to grant waivers on a case-by-case basis where "denying entry would cause the foreign national undue hardship; entry would not pose a threat to the national security or public safety of the United States; and entry would be in the national interest."[19]

Again responding swiftly, the State of Hawaii filed a Third Amended Complaint, challenging the Proclamation under the INA, various other statutes, and the Establishment Clause and Equal Protection component of the Due Process Clause.[20] Hawaii sought and received another temporary restraining order from the district court barring nationwide enforcement of the Proclamation's entry ban, except with respect to nationals of North Korea and Venezuela, which was later converted into a preliminary injunction.[21] The Ninth Circuit upheld the injunction except as to persons who lack a bona fide relationship to a person or entity in the United States, finding that the Proclamation was likely to violate the Immigration and Nationality Act.[22] But on December 4, 2017, the Supreme Court again stayed the injunction, allowing enforcement of the ban to proceed pending litigation in the Fourth and Ninth Circuits.[23] Then on January 5, 2018, the federal government petitioned the Supreme Court to grant certiorari, arguing that the Proclamation was a lawful exercise of the President's broad authority to prohibit or restrict the entry of aliens outside the United

---

[8] 82 Fed. Reg. 13209.

[9] 82 Fed. Reg. 13209.

[10] *Hawai'i v. Trump*, 241 F.Supp.3d 1119 (D. Haw. 2017).

[11] *International Refugee Assistance v. Trump*, 241 F.Supp.3d 539 (D. Md. 2017).

[12] *Hawai'i v. Trump*, 859 F.3d 741 (9th Cir. 2017).

[13] *International Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017).

[14] *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017).

[15] 137 S. Ct. at 2088.

[16] 82 Fed. Reg. 45161.

[17] 82 Fed. Reg. 45161.

[18] 82 Fed. Reg. 45161.

[19] 82 Fed. Reg. 45161.

[20] The International Refugee Assistance Program also filed suit and its case is pending in the Fourth Circuit, but that case is not the subject of the Supreme Court's January 18 grant of certiorari.

[21] *Cert. Petition*, 2018 U.S. S. Ct. Briefs LEXIS 27, at *25 (Jan. 5, 2018).

[22] 2018 U.S. S. Ct. Briefs LEXIS 27, at *8 (Jan. 5, 2018).

[23] *Trump v. Hawaii*, 2017 U.S. LEXIS 7357.

States when he deems it in the Nation's interest.[24] This brings us to January 19, 2018, and the Supreme Court's grant of *certiorari.*

The Parties' Positions on Certiorari

According to the federal government in its Petition for Certiorari, the previous executive orders established the President's intent to seek review of security measures in place regarding immigration from the selected countries. The Government claims that the Proclamation is a lawful result of that review, that the President was within his authority to establish tailored restrictions[25] on immigration from the countries identified in the Proclamation pursuant to the Department of Homeland Security's review of each country's identity-management and information-sharing protocols and terrorism- and public safety-related risks.[26] The Supreme Court must now take control of the matter, according to the federal government, because the Courts of Appeals, in their decisions upholding injunctions against the ban, "have overridden the President's judgments on sensitive matters of national security and foreign relations, and severely restricted the ability of this and future Presidents to protect the Nation."[27]

The Hawaii plaintiffs responded with the argument that Congress and the Constitution have never granted the President limitless power to discriminate based on nationality and override the immigration laws whenever he chooses.[28] Because no court has found the Proclamation lawful, and the Ninth Circuit's decision to uphold the injunction was correct, they argued, Supreme Court review is unnecessary, and *certiorari* should be denied.[29] Emphasizing Congress's constitutional role as author of the country's immigration policy, the plaintiffs acknowledged that the President has the residual authority to address categories of harmful aliens that Congress has not considered or to account for an exigency that Congress cannot practicably address.[30] However, this authority does not allow the President to "effortlessly evade the statute's specifically tailored criteria for inadmissibility."[31] The Proclamation departed significantly from past presidential practices by excluding not specific classes of foreign nationals whose entry could justifiably be deemed detrimental to the interests of the United States, such as spies and war criminals, but entire nationalities.[32]

In addition to disregard for the President's balance of power with Congress under the Constitution and immigration statutes, argued Hawaii, the Proclamation represented a violation of the Establishment Clause.[33] Further, the addition of North Korea and Venezuela were no more than a symbolic attempt to downplay the mountain of evidence indicating the President's animosity towards Muslims from the Middle East and North Africa, and his

---

[24] *Cert. Petition,* 2018 U.S. S. Ct. Briefs LEXIS 27, at *15-24 (Jan. 5, 2018).

[25] The country-specific tailored restrictions are as follows: "For countries that refuse to cooperate regularly with the United States (Iran, North Korea, and Syria), Section 2 of the Proclamation suspends entry of all nationals, except for Iranians seeking nonimmigrant student (F and M) and exchange-visitor (J) visas. For countries that are valuable counter-terrorism partners but have information-sharing deficiencies (Chad, Libya, and Yemen), the Proclamation suspends entry only of nationals seeking immigrant visas and nonimmigrant business, tourist, and business/tourist visas. For Somalia, the Proclamation suspends entry of nationals seeking immigrant visas and requires additional scrutiny of nationals seeking nonimmigrant visas, in light of "special concerns that distinguish it from other countries," including Somalia's "significant identity-management deficiencies," the "persistent terrorist threat" that "emanates from" Somalia, and "the degree to which [Somalia's] government lacks command and control of its territory." And for Venezuela, which refuses to cooperate in information sharing but for which alternative means are available to identify its nationals, the Proclamation suspends entry only of government officials "involved in screening and vetting procedures" and "their immediate family members" on nonimmigrant business or tourist visas." *Appellee's Brief,* 2018 U.S. S. Ct. Briefs LEXIS 27, at *23-24 (Jan. 5, 2018) (internal citations omitted).

[26] *Cert. Petition*, 2018 U.S. S. Ct. Briefs LEXIS 27, at *28.

[27] 2018 U.S. S. Ct. Briefs LEXIS 27, at *32 (January 5, 2018).

[28] *Trump v. Hawaii Appellee's Brief*, 2018 U.S. S. Ct. Briefs LEXIS 96, at *7 (Jan. 12, 2018) (hereinafter "Appellee's Brief").

[29] 2018 U.S. S. Ct. Briefs LEXIS 96, at *7 (Jan. 12, 2018).

[30] 2018 U.S. S. Ct. Briefs LEXIS 96, at *33 (Jan. 12, 2018).

[31] 2018 U.S. S. Ct. Briefs LEXIS 96, at *33 (Jan. 12, 2018).

[32] 2018 U.S. S. Ct. Briefs LEXIS 96, at *35-40 (Jan. 12, 2018).

[33] 2018 U.S. S. Ct. Briefs LEXIS 96, at *53-55 (Jan. 12, 2018).

intent to restrict their presence in the United States.[34] For all these reasons, the plaintiffs argued, the Ninth Circuit's injunction was proper and Supreme Court review unwarranted.

In the end, the Supreme Court decided to grant *certiorari*. In a two-sentence opinion, the Court wrote: "Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted. In addition to the questions presented by the petition, the parties are directed to brief and argue Question 3 presented by the brief in opposition." It is, of course, difficult to predict how the Justices will rule on the merits of these complex questions. That being said, the Supreme Court's previous decisions regarding the travel ban may shed some light on their positions. When a majority of the Court limited the enforceability of the ban in June 2017, Justices Gorsuch, Alito, and Thomas dissented in part, noting that they would have allowed the entire travel ban to go into full effect.[35] On the other hand, when the federal government successfully petitioned for a stay of the injunctions against the ban in December 2017, Justices Ginsburg and Sotomayor noted that they would have denied the stay.[36] As of January 24, 2018, the arguments have not been scheduled for the sessions beginning February 20 or March 19, 2018, so it appears we will have to wait until at least late spring for answers.[37]

Issues Raised on Certiorari

The questions presented by the federal government in its Petition for Certiorari are:

1. Whether respondents' challenge to the President's suspension of entry of aliens abroad is justiciable.
2. Whether the Proclamation is a lawful exercise of the President's authority to suspend entry of aliens abroad.
3. Whether the global injunction is impermissibly overbroad.[38]

The questions presented by the State of Hawaii in its Brief in Opposition are:

1. Whether Proclamation No. 9645 exceeds the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a).
2. Whether Proclamation No. 9645 "discriminate[s] because of nationality" in violation of 8 U.S.C. § 1152(a)(1)(A).
3. Whether Proclamation No. 9645 violates the Establishment Clause.[39]

Conclusions

On January 19, the Supreme Court granted *certiorari* in the case *Trump v. State of Hawaii,* agreeing to hear arguments and perhaps resolve once and for all the long simmering dispute over the President's travel ban efforts. A decision is expected in the spring. Finally, it seems, Americans will have an answer from the nation's highest court as to whether the travel ban, at least in its latest iteration, is a lawful exercise of presidential authority or an unlawful example of anti-Muslim discrimination.

Amanda M. Ghannam is a third-year student at Northeastern University School of Law in Boston, Massachusetts. Her law school coop experience includes a year of internships at private firms, state agencies, and federal courts. Amanda has been published in the Northeastern University Law Review Forum and participated in a national mock trial competition. She graduates in May 2018 with a concentration in Labor, Work, and Income, and holds a Bachelor of Arts degree from the University of Michigan-Dearborn.

[34] "A prior sanctions order already restricts the entry of North Korea's nationals (who virtually never apply for admission to the United States in any event), and only a small handful of Venezuelan government officials are affected by EO-3. Indeed, one might be forgiven for assuming that these countries were added primarily to improve the Government's "litigating position," rather than to achieve any legitimate substantive goal." 2018 U.S. S. Ct. Briefs LEXIS 96, at *54 (Jan. 12, 2018).

[35] *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017).

[36] *Trump v. Hawaii,* 2017 U.S. LEXIS 7357; T*rump v. Int'l Refugee Assistance Project,* 2017 U.S. LEXIS 7358.

[37] *See* "Calendars and Lists," Supreme Court of the United States, https://www.supremecourt.gov/oral_arguments/calendarsandlists.aspx (February 11, 2018).

[38] *Cert. Petition,* 2018 U.S. S. Ct. Briefs LEXIS 27, at *8 (January 5, 2018).

[39] *Appellee's Brief*, 2018 U.S. S. Ct. Briefs LEXIS 96, at *7 (Jan. 12, 2018).

RECENT DEVELOPMENTS

ADA

Court Amends EEOC Wellness Reg Order

Last December, the U.S. District Court for the District of Columbia vacated portions of the regulations that had been issued by the U.S. Equal Employment Opportunity Commission ("EEOC") governing the application of the Americans with Disabilities Act ("ADA") and the Genetic Information Non-Discrimination Act ("GINA") to employer-sponsored wellness programs. *See AARP v. EEOC*, 2017 U.S. Dist. LEXIS 208965 (D.D.C. Dec. 20, 2017). The district court's order was based upon its earlier ruling that the EEOC's regulations permitting incentives or penalties of up to 30 percent of an employee's self-only coverage were inconsistent with the requirements of both the ADA and GINA because those statutes allow an employer to obtain medical information from an employee only on a voluntary basis. In its December order, the court declined to immediately vacate the EEOC's rules. Instead, the court stayed its mandate until January 1, 2019, to allow the Commission to undertake a new rule-making proceeding. The court additionally stated that it would hold the EEOC to a deadline of August 2018, for the issuance of a notice of proposed rulemaking.

Following the issuance of the court's order, the EEOC filed an unopposed motion asking the district court to reconsider its order requiring the EEOC to issue a notice of proposed rulemaking by a particular date or otherwise limiting its future policy discretion. In its motion, the EEOC took the position that the Commission was under no legal obligation to conduct further rulemaking or even promulgate new regulations. Instead, the EEOC said that it could decide to "leave the regulations as they stand following vacatur." *See* Defendant's Unopposed Motion for Partial Reconsideration of December 20, 2017 Order, C.A. No. 16-cv-02113 (JDB) (D.D.C. filed, Jan. 16, 2018).

On January 18, 2018, the district court granted in part, and denied in part, the EEOC's motion. The district court reaffirmed its order to vacate the challenged portions of the EEOC's wellness regulations as of January 1, 2019, and said that the court would retain jurisdiction until that date. However, the court said that it would vacate that portion of its December 2017 order to eliminate the requirement that the EEOC issue a notice of proposed rulemaking by August 2018 or any other set schedule. *Order, AARP v. EEOC*, C.A. No. 16-cv-02113 (D.D.C., Jan. 18, 2018).

Accordingly, unless the EEOC promulgates new final wellness plan rules to take effect by January 1, 2019, the challenged portions of its existing rules allowing incentives of up to 30 percent of self-only coverage for the disclosure of medical information will be vacated.

Editor's Note: For a discussion of prior proceedings in the case, see J. Mook, "Court Sends ADA/GINA Wellness Regs Back to EEOC," 17 Bender's Lab. & Empl. Bull. 273 (Oct. 2017); J. Mook, "Existing EEOC Wellness Regs Must End By 2019," 18 Bender's Lab. & Empl. Bull. 50 (Feb. 2018).

Fifth Circuit Revives Employee's ADA Claims

Williams v. Tarrant County College District, 2018 U.S. App. LEXIS 1196 (5th Cir. Jan. 18, 2018).

Christy Williams ("Williams"), a writing tutor for Tarrant County College District ("TCCD"), was diagnosed with major depressive disorder and hypothyroidism and, since childhood, has dealt with attention deficient hyper activity disorder ("ADHD") and post-traumatic stress disorder. After being assaulted in February 2012, the symptoms of her impairments became aggravated and triggered anxiety problems. Her condition deteriorated, culminating in an incident at work when she became agitated and began to cry uncontrollably after her supervisors informed her that she had been the subject of a complaint by the TCCD faculty.

Following this incident, Williams went on leave under the Family Medical Leave Act ("FMLA") while she received medical treatment. Williams' doctors informed TCCD that she was receiving treatment and planned to return to work on January 2, 2013. On that day, Williams provided TCCD with a fitness-for-duty form completed by her doctor, which cleared her to work with no restrictions, but requested that TCCD make reasonable accommodations for her. TCCD, however, did not return Williams to work. Instead, TCCD informed her that she should remain on leave. Five days later, Williams received a letter from TCCD explaining that she had been terminated for past poor performance.

Subsequently, Williams filed a lawsuit in federal district court for the Northern District of Texas claiming, inter alia, violations of the Americans with Disabilities Act ("ADA") and state disability law. The district court granted summary judgment against Williams, finding that she had failed to provide evidence that she was disabled or that she had been terminated due to any purported disability. Williams appealed the dismissal of her lawsuit to the Fifth Circuit Court of Appeals.

In addressing Williams' appeal, the Fifth Circuit first considered whether Williams had sufficiently shown that she suffered from an actual "disability" covered by the ADA by having a physical or mental impairment that substantially limits one or more major life activities. In the proceedings below, William had presented a declaration detailing her diagnosis, treatments and symptoms since childhood and elaborating on some of the more recent effects of her ailments, including her difficulties in thinking, concentrating, taking care of herself and sleeping normally. The district court had disregarded Williams' declaration as being "self-serving" and without medical documentation or corroboration, which the district court viewed as being necessary.

The Fifth Circuit disagreed, pointing out that the ADA Amendments Act of 2008 ("ADAAA") and the implementing regulations of the U.S. Equal Employment Opportunity Commission ("EEOC") make clear that a showing of a substantial limitation of a major life activity usually will not require scientific, medical or statistical analysis. Therefore, the Fifth Circuit held that the district court's requirement that Williams present medical corroboration for her declaration was erroneous. Accordingly, the Fifth Circuit held that Williams' declaration as to her impairments and the limitations those impairments imposed upon her life activities created a genuine dispute of material fact, which would need to be resolved by a jury.

In a similar vein, the Fifth Circuit noted that Williams had sufficiently shown that TCCD had regarded her as disabled. To pursue a regarded-as-disabled claim under the ADAAA, the court said that Williams needed to show only that TCCD was aware of her impairments and, as a result, terminated her employment. The Fifth Circuit found that Williams had met this requirement. Not only was there evidence that TCCD was aware of Williams' impairments, but prior to the incident at work in November 2012, and her taking FMLA leave, there was no indication that she was being considered for termination. This evidence, the circuit court determined, was sufficient to demonstrate that TCCD had terminated Williams due to her impairments irrespective of whether those impairments rose to the level of an actual disability.

Accordingly, the Fifth Circuit reversed the district court's dismissal of Williams' ADA claims under both the actual and regarded as standards and remanded those claims to the district court for further proceedings.

Constitutional Law

No Property Rights, No Claim

Kando v. Rhode Island State Board of Elections, 2018 U.S. App. LEXIS 1473 (1st Cir. Jan. 22, 2018)

After being terminated from his job as executive director of the Rhode Island State Board of Elections, Robert Kando filed suit against the Board in the United States District Court for the District of Rhode Island under 42 U.S.C. § 1983, asserting that his dismissal constituted a deprivation of his right to due process. The Board asserted that, as an at-will employee, he possessed no property right in his continued employment and that it was within its rights in terminating him. The district court agreed and entered judgment in favor of the Board, simultaneously declining to exercise jurisdiction over various state law claims also asserted by Kando.

On appeal, the First Circuit affirmed. It first observed that Kando's claim under § 1983 was two-fold: that the Board violated the Due Process Clause by (1) depriving him of his employment without due process of law; and (2) stigmatizing him without providing an opportunity for a name-clearing hearing. As to the first part of his claim, Kando was required to show that he had a cognizable property right under state law to continued employment at "a level sufficient to trigger due process protections[.]" (the latter determination being a federal law question). Under Rhode Island law, the position from which he was dismissed was denominated "unclassified," which, according to the Rhode Island Supreme Court, means that the employee "serve[s] at the pleasure of the appointing authority and ordinarily can be dismissed for any reason other than a discriminatory one."

Kando argued that, notwithstanding his unclassified status, prior to his dismissal, the Board had ordered him to attend three semesters of college-level management courses and informed him that it would review his job status upon his completion of that requirement. According to Kando, those circumstances gave rise to a contract that guaranteed him a right to continued employment at least until he complete the management courses, a contract that the Board breached when it terminated him before he completed the courses. The First Circuit rejected that argument (and several less persuasive arguments posited by Kando):

> This assertion runs headlong into the pronouncements of the Rhode Island Supreme Court, which has held that "alleged . . . promises [of continued employment], even if presumed to have been made, cannot, as a matter of law, expand the limits imposed by the Legislature upon the termination

> rights of unclassified state employees." Since any promises made by the Board could not have overridden the statutory designation of the plaintiff's position, his suggestion that the Board somehow modified his at-will status is doomed to failure: even if the Board had meant to offer the plaintiff a contractual guarantee of continued employment, it lacked the authority (actual or apparent) to do so.

With respect to the second part of his claim—that the Board stigmatized him without providing an opportunity for a name-clearing hearing—the court concluded that it was without merit for several reasons. First, Kando's vague assertions that the Board made false statements about his role and conduct were insufficiently stigmatizing to impact his liberty interest: "[E]ven statements that suggest that an employee was incompetent, not good at his job, or inattentive to duty do not rise to the level of seriousness sufficient to trigger constitutional interests."

Second, Kando never claimed that the challenged statements were intentionally publicized or disseminated by the Board:

> This omission is fatal: to give rise to a stigmatization claim, the employer must have taken deliberate steps to publicize or disseminate the false statements. Water-cooler gossip, widespread rumors, and random leaks will not suffice to prove the required element. As we have said, "it takes a more formal statement to constitute publication."

Third:

> The . . . stigmatization claim also fails because his complaint never alleges that the challenged statements were made in conjunction with his termination. Although he alleges that the Board "routinely and regularly" portrayed him in a false and inaccurate manner, that is not the same as alleging that those depictions were either directly connected to his dismissal or uttered in the course of that dismissal.

Finally, Kando failed to request a name-clearing hearing, "an essential element of a stigmatization claim."

Employment Agreements

Financial Firms Revisiting Approach to Restrictive Covenants

Many business owners utilize some form of restrictive covenant when hiring employees. Whether it is to protect trade secrets or customer lists, or to ensure that sensitive information remains confidential, employees routinely execute agreements barring them from competing with their former employer, soliciting their former employer's clients, or taking certain information with them when they leave.

While the enforcement of these covenants varies across jurisdictions, financial advisors and wealth management firms have chosen in the past to take a different tact. Instead of trying to restrict wealth managers from taking their clients with them when they moved to new firms, these firms voluntarily joined the Broker Protocol, which permitted wealth managers to take certain client information with them when they left and allowed managers to solicit their clients to join them at their new firms. Wealth management firms believed that competition for the managers, and their clients, was a good thing.

The good times may be coming to an end. A recent article in the New York Times noted that Morgan Stanley, UBS and Citibank withdrew from the Broker Protocol last year. If other brokerages, especially the larger ones, follow suit, clients may see their advisors subject to increased restrictions upon departing. This usually means one thing: litigation. While post-employment restrictions are subject to various levels of enforcement, the threat of litigation, and its attendant costs, will surely chill the liberal movement of wealth managers from one firm to another.

FLSA

Fourth Circuit Revives Live-in Innkeepers' FLSA Claims

Balbed v. Eden Park Guest House, LLC, 2018 U.S. App. LEXIS 1915 (4th Cir. Jan. 25, 2018)

A recent case decided by the United States Court of Appeals for the Fourth Circuit, *Balbed v. Eden Park Guest House,* sheds some light on the somewhat confusing FLSA analysis that comes into play when an employer provides an employee on-site lodging and other benefits. At its most basic level, the FLSA requires an employer to pay an employee a minimum wage rate determined by the number of hours an employee works and the remuneration received for those hours worked. Things get a little complicated when an employee receives employer-provided lodging. Determining FLSA compliance requires two initial calculations: (a) the hours the employee actually works (i.e. is the employee "working" while watching television in his or her lodgings), and (b) the value of the

on-site lodging. In the *Balbed* case, the Fourth Circuit examined these issues in the context of an agreement that provided that Balbed "work" at least 29 hours a week.

Eden Park argued that the agreement was a "reasonable agreement" under FLSA regulations, and, as such, the court did not have to examine whether other on-site lodging requirements were met (i.e. lodging is provided in compliance with other law, the employer maintains accurate records of the costs of the lodging). The Fourth Circuit disagreed and ruled that Eden Park conflated the terms of the "reasonable agreement" with the value of the lodgings. Put another way, the court stated that while the agreement could denote how many hours the employee was "working" while also living on the premises, it did not bear on other FLSA requirements as to the value of the lodging provided to the employee. Remember, the two basic components of the FLSA are how many hours worked, and what did the employee receive (whether straight wages or combined with benefits such as lodging, meals, etc.). These are two separate analyses and Eden Park failed to address the second.

Litigation

Award of Costs to Employer Upheld

Armstrong v. BNSF Railway. Co., 2018 U.S. App. LEXIS 1208 (7th Cir. Jan. 18, 2018)

After he was fired from his conductor job, Glen Armstrong filed suit in United States District Court for the Northern District of Illinois against BNSF Railway under the Federal Rail Safety Act (FRSA), alleging that his discharge constituted unlawful retaliation under that statute. After trial, the jury returned a verdict in favor of the railway and the district court awarded it costs. On appeal to the Seventh Circuit, Armstrong argued, among other things, that the lower court had erred in awarding the railway costs because the FRSA does not allow for an award of costs to employers.

The appellate court disagreed and upheld the lower court's decision. It noted that, under the Federal Rules of Civil Procedure, "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." It also observed that the presumption in favor of the award of costs created by the Rule is difficult to overcome and that the Supreme Court has made clear that a district court's decision to award costs can only be displaced only by a federal statute precluding the award of costs.

Armstrong argued that, because the FRSA expressly provides for an award of costs to a prevailing employee but is silent with respect to the award of costs to an employer, only employees may be awarded costs. The Seventh Circuit rejected the argument: "The FRSA's silence on cost awards to prevailing employers, even in conjunction with its mandate regarding prevailing employees, is insufficient to overcome the 'venerable presumption that prevailing parties are entitled to costs.' Therefore, the district court did not abuse its discretion by awarding costs to BNSF."

NLRB

John Ring Nominated for NLRB Post

On January 16, 2016, President Trump nominated John Ring, co-chair of the labor and employment law practice at Morgan, Lewis & Bockius to serve on the National Labor Relations Board for a term that would expire December 16, 2022. Senate confirmation of Ring would restore the Republican majority that the party acquired when William Emanuel was seated in September of last year. That majority was lost when Chairman Philip Miscimarra's term expired on December 16. In the five days prior to the 16th, the Board issued five decisions overturning Obama-era Board decisions and it is anticipated that the restoration of the Republican majority on the Board will result in more business-friendly decisions.

Ring received his B.A. from the Catholic University of America and joined Morgan, Lewis & Bockius immediately upon his graduation from that university's law school in1988. If Ring is confirmed, the Board will be at full strength and, in addition to Mr. Ring, will consist of Chairman Marvin E. Kaplan (R) and Members Lauren McFerran (D), Mark Gaston Pierce (D), and William Emanuel (R).

NLRB Will Extend Time for Filing Responses to the Request for Information Regarding Representation Election Regulations

As reported in the January 2018 Bulletin, ("Board Seeking Information on 2014 Election Rule"), the Board, on December 13, 2017, published a Request for Information Regarding Representation Election Regulations, seeking comments on the Final Election Rule adopted by the Board in 2014. The 2014 Rule amended existing representation election procedures in a manner that

substantially streamlined the process and shortened the elapsed time between the filing of an election petition and the holding of the election. The new Request for Information poses three questions for comment:

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Representation Election Regulations that were in effect prior to the 2014 Election Rule's adoption, or should the Board make changes to the prior Representation Election Regulations? If the Board should make changes to the prior Representation Election Regulations, what should be changed?

The decision to publish the Request for Information was approved by the Republican Board members, Chairman Miscimarra and Members Kaplan and Emanuel. Former Chairman (now Member) Pearce, a Democrat, who had championed the 2014 Rule, filed a blistering dissent, as did Member McFerran, also a Democrat.

Comments were initially scheduled to be received not later than February 12, 2018. The Board has now extended that time such that interested parties may file responses on or before Monday, March 19, 2018. Complete instructions for filing responses are available at https://www.nlrb.gov/reports-guidance/public-notices/request-information.

Religious Freedom

Trump Administration Acts to Protect Workers Opposed to Abortion

Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (2018) (proposed January 26, 2018)

Fulfilling a pledge to his core constituency, the Trump administration has proposed a regulation that will strengthen the rights of faith-based employees to tailor the work demands of their employers to the dictates of their consciences. Noting that "the United States has a long history of providing conscience-based protections for individuals and entities with objections to certain activities based on religious belief and moral convictions," the Department of Health and Human Services has proposed to revise previously promulgated regulations "to ensure that persons . . . are not subjected to . . . practices or policies that violate conscience, coerce, or discriminate, in violation of . . . Federal laws.

As set forth in the proposed rule, the laws with which it is concerned consist of:

- Conscience protections related to abortion, sterilization, and certain other health services to participants in programs—and their personnel—funded by the Department (the Church Amendments, 42 U.S.C. 300a-7);
- Conscience protections for health care entities related to abortion provision or training, referral for such abortion or training, or accreditation standards related to abortion (the Coats-Snowe Amendment, 42 U.S.C. 238n);
- Protections from discrimination for health care entities and individuals who object to furthering or participating in abortion under programs funded by the Department's yearly appropriations acts (e.g., Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. H, Tit. V, sec. 507(d) (the Weldon Amendment) and at Div. H, Tit. II, sec. 209);
- Conscience protections under the Patient Protection and Affordable Care Act (ACA) related to assisted suicide (42 U.S.C. 18113), the ACA individual mandate (26 U.S.C. 5000A(d)(2)), and other matters of conscience (42 U.S.C. 18023(c)(2)(A)(i)-(iii), (b)(1)(A) and (b)(4));
- Conscience protections for objections to counseling and referral for certain services in Medicaid or Medicare Advantage (42 U.S.C. 1395w-22(j)(3)(B) and 1396u-2(b)(3)(B));
- Conscience protections related to the performance of advanced directives (42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406);
- Conscience protections related to Global Health Programs to the extent administered by the Secretary (22 U.S.C. 7631(d); Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. J, Tit. VII, sec. 7018 (Helms Amendment));
- Exemptions from compulsory health care or services generally (42 U.S.C. 1396f & 5106i(a)(1)), and under specific programs for hearing screening (42 U.S.C. 280g-1(d)), occupational illness testing (29 U.S.C. 669(a)(5)); vaccination (42 U.S.C. 1396s(c)(2)(B)(ii)), and mental health treatment (42 U.S.C. 290bb-36(f)); and
- Protections for religious nonmedical health care (e.g., 42 U.S.C. 1320a-1, 1320c-11, 1395i-5 and 1397j-1(b)).

The proposed rule seeks to protect against adverse action health care employees who refuse to participate in procedures to which they have a conscientious objection.

The breadth of the regulation can be discerned from the definition of "discrimination" set forth in the proposed rule:

> Discriminate or Discrimination: The Department proposes to define "discriminate" or "discrimination" to mean, as applicable and as permitted by the applicable statute, (1) to withhold, reduce, exclude, terminate, restrict, or otherwise make unavailable or deny any grant, contract, subcontract, cooperative agreement, loan, license, certification, accreditation, employment, title, or other similar instrument, position, or status; (2) to withhold, reduce, exclude, terminate, restrict, or otherwise make unavailable or deny any benefit or privilege; (3) to utilize any criterion, method of administration, or site selection, including the enactment, application, or enforcement of laws, regulations, policies, or procedures directly or through contractual or other arrangements, that tends to subject individuals or entities protected under this part to any adverse effect described in this definition, or to have the effect of defeating or substantially impairing accomplishment of a health program or activity with respect to individuals, entities, or conduct protected under this part; or (4) to otherwise engage in any activity reasonably regarded as discrimination, including intimidating or retaliatory action. The 2008 Rule did not define this term—it is defined here in order to provide clearer notice to the public about what sort of conduct certain provisions of this proposed rule would prohibit.
>
> A functional concept of "discrimination" in this context must account for the various forms that violations of the right of conscience can take. One way Federal law prohibits such violations is by requiring that religious individuals or institutions be allowed a level playing field, and that their beliefs not be held to disqualify them from participation in a program or benefit. For example, a medical school that receives a grant under the Public Health Service Act may not deny admission to an applicant based on that applicant's conscientious objection to participating in an abortion. 42 U.S.C. 300a-7(e). This form of discrimination, broadly conceived—denial of participation in a program, service, or benefit—parallels the type of discrimination typically prohibited with respect to other protected characteristics such as race, color, or national origin. See 45 CFR 80.3 (HHS regulations implementing Title VI nondiscrimination requirements and prohibiting, inter alia, "Deny[ing] an individual any service . . .", "Subject[ing] an individual to segregation or separate treatment . . .", "Treat[ing] an individual differently from others in determining whether he satisfies any admission . . . requirement . . .", etc., on the basis of race, color, or national origin). HHS believes it appropriate to apply the general principles of nondiscrimination enshrined in Title VI with full force to discrimination on the basis of religious belief or moral conviction.
>
> Freedom from discrimination on the basis of religious belief or moral conviction, however, does not just mean the right not to be treated differently or adversely; it also means being free not to act contrary to one's beliefs. To that end, Federal law carves out exemptions based on religious and/or conscientious objection to otherwise generally applicable requirements that compel certain conduct. For instance, as discussed infra, although the ACA's individual mandate compels, via force of a tax penalty, the purchase of minimum essential health coverage, that mandate exempts certain religious organizations and individuals who conscientiously oppose acceptance of the benefits of any private or public insurance. 26 U.S.C. 1402(g)(1). OCR solicits comments regarding the impact on the proposed regulation of the planned elimination of the penalty for failure to carry ACA-mandated health insurance as set forth in the major tax reform legislation passed at the end of 2017.
>
> The intersection of religion and health care may also create the more unusual and insidious circumstance in which governmental authorities unlawfully seek to target religious organizations or individuals for additional legal or regulatory burdens, precisely because of their exercise of a particular religious belief or moral conviction. See *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993) (striking down facially neutral ordinance gerrymandered to apply only to religiously motivated conduct). The Supreme Court has made clear that governmental burdens on speech targeting particular viewpoints are presumptively unconstitutional. *Matal v. Tam*, 137 S.Ct. 1744, 1766 (2017) ("A law found to discriminate based on viewpoint is an egregious form of content discrimination, which is presumptively unconstitutional." (internal citations and quotations omitted)). Thus, within OCR's regulatory ambit, and to the extent permitted by law, OCR will regard as presumptively discriminatory any law, regulation, policy, or other such exercise of authority that has as its purpose, or explicit or otherwise clear application, the targeting of religious or conscience-motivated conduct. In determining the purpose or justification of such an exercise of authority, OCR will consider all relevant factors and proposes to include in that analysis, when supported by the applicable statute, whether or not the exercise of authority has a disparate impact on religious believers or those who share a particular

religious belief or moral conviction. The Department solicits comment on whether disparate impact analysis is appropriate, as a policy or legal matter, to apply to any of the statutes implemented by this rule; whether it is appropriately included in the definition of discrimination, and, if so, how disparate impact analysis would be best performed in the context of applicable Federal health care conscience and associated anti-discrimination laws (e.g., how groups suffering the disparate impact can be described under the various statutes).

Those wishing to comment on the proposal may do so in accordance with the following instructions:

DATES:

Submit comments on or before March 27, 2018.

ADDRESSES:

You may send comments, identified by RIN 0945-ZA03 or Docket HHS-OCR-2018-0002, by any of the following methods:

- *Federal eRulemaking Portal*. You may submit electronic comments at http://www.regulations.gov by searching for the Docket ID number HHS-OCR-2018-0002. Follow the instructions for sending comments.
- *Regular, Express, or Overnight Mail*: U.S. Department of Health and Human Services, Office for Civil Rights, Attention: Conscience NPRM, RIN 0945-ZA03, Hubert H. Humphrey Building, Room 509F, 200 Independence Avenue SW, Washington, DC 20201.
- *Hand Delivery/Courier*: Department of Health and Human Services, Office for Civil Rights, Attention: Conscience NPRM, RIN 0945-ZA03, Hubert H. Humphrey Building, Room 509F, 200 Independence Avenue SW, Washington, DC 20201.

Instructions: All submissions received must include "Department of Health and Human Services, Office for Civil Rights RIN 0945-ZA03" for this rulemaking. All comments received will be posted without change to http://www.regulations.gov, including any personal information provided. Further instructions are available under PUBLIC PARTICIPATION.

Docket: For complete access to the docket to read background documents or comments received, go to http://www.regulations.gov and search for Docket ID number HHS-OCR-2018-0002.

FOR FURTHER INFORMATION CONTACT:

Sarah Bayko Albrecht at (800) 368-1019 or (800) 537-7697 (TDD).

Union Membership in the U.S.

On January 19, 2018, the Department of Labor released its annual report on the status of union membership in the United States, showing that, for calendar year 2017, the union membership rate was unchanged from 2016, holding at 10.7 percent. The actual number of employees who were union members in 2017 increased by 262,000 workers to 14.8 million. By comparison, in 1983, when the DoL first started reporting such data, the union membership rate was 20.1 percent, nearly double the 2017 rate, and total union membership was 17.7 million workers.

If only private-sector employment is considered, the 2017 union membership rate drops to 6.5 percent, demonstrating the strength of organized labor's influence in the public sector, where more than 34 percent of the workforce is unionized—over five times the rate in the private sector. Stated another way, in the public sector workforce, consisting of nearly 21 million workers, 7.2 million employees are unionized; in the private sector workforce, consisting of nearly 117 million workers, 7.6 million employees are organized. The occupations with the highest rate of unionization are teachers, police officers and firefighters.

The statistics show that unionized employees enjoy a substantially higher median weekly wage than non-unionized employees: $1,041 versus $829.

Wage-Hour Laws

Massachusetts: Unused Sick Leave Not "Wages"

Mui v. Massachusetts Port Authority, 478 Mass. 710 (2018)

The Massachusetts' Wage Act requires the payment of wages on a weekly or biweekly basis. It further provides that "any employee leaving his [or her] employment shall be paid in full on the following regular pay day," and that "any employee discharged from . . . employment shall be paid in full on the day of his discharge . . . the wages or salary earned by him." Violations of the act result in strict civil liability and treble damages.

Under the sick pay policy of the Massachusetts Port Authority, employees receive payment for a percentage of the value of their accrued, unused sick time upon separation from the agency, unless they are discharged for cause, in which case they are not eligible for any payment for unused sick leave. Tze-Kit Mui was discharged by the Port Authority allegedly for cause. As

such, he was not paid for any unused sick leave upon termination. An arbitrator later ruled that the discharge was not for cause. Upon receipt of that ruling, the Port Authority paid Mui for his unused sick leave in accordance with its policy, but over a year after his separation from employment. Mui sued in state court asserting that the accrued, unused sick leave pay to which he was entitled constituted "wages" under the Wage Act and should have been paid at the time of his discharge.

The Massachusetts Supreme Judicial Court disagreed, concluding, as a matter of statutory interpretation that sick pay did not constitute wages. Key to the Court's determination is the fact that sick leave is conditional:

> unlike vacation time, which can be used for time away from work for any reason, sick time is to be used only when the employee or a family member is ill. Thus, because its usage is conditional, i.e., employees do not have an absolute right to spend down their sick time, employees are not typically compensated for accrued, unused sick time. And although an employee may use accrued sick time under appropriate conditions, such time may be considered "lost" if not used. Such "use it or lose it" sick time policies are common. Because accrued, unused sick time is not compensable under a "use it or lose it" sick time policy, such time clearly is not a wage under the act.

(Citations omitted).

Workplace Violence

Virginia General Assembly Considering Legislation to Limit Liability for Disclosing Threats of Workplace Violence

On January 17, 2018, Delegate Chris Hurst of Blacksburg introduced legislation that would grant civil immunity to employers who share information about violent acts or threats made by current or former employees to prospective employers or law enforcement agencies. The proposed legislation, House Bill No. 1457, would also grant civil immunity to employers who rely upon such information in hiring decisions.

The bill would protect employers who disclose information about potential threats from civil liability so long as the employer acted "in good faith and with reasonable cause." There would be a presumption that the disclosing employer acted in good faith, subject to rebuttal if the employee can show by clear and convincing evidence that the employer knew the information was false or acted with reckless disregard for its truth or falsity. Likewise, an employer who does not hire an applicant based upon a disclosure made pursuant to this law is immune so long as it "takes reasonable action in good faith to respond to the violent or threatened violent behavior noted in such report." Under the bill, an employer who succeeds in getting a lawsuit against it dismissed pursuant to this statutory immunity is entitled to recover reasonable attorney's fees and costs.

The bill's sponsor, Delegate Hurst, was dating Roanoke WDBJ television reporter Alison Parker when she was shot and killed by a former WDBJ co-worker in 2015. The assailant, Vester Flanagan, had had a troubled employment history of which WDBJ was unaware when it hired him. It fired him in 2013 after he displayed erratic behavior which made co-workers uncomfortable.

CALENDAR OF EVENTS

2018

Mar. 4-7	NELI Employment Law Briefing	Vail, CO
Mar. 11-14	NELI Employment Law Briefing	Miami Beach, FL
Mar. 25-28	NELI Employment Law Briefing	Palm Springs, CA
Apr. 12-13	NELI ADA & FMLA Compliance Update	San Francisco, CA
Apr. 19-20	NELI ADA & FMLA Compliance Update	Washington, DC
Apr. 26-27	NELI: ADA & FMLA Compliance Update	Chicago, IL
May 10-11	NELI Employment Law Conference	Chicago, IL
May 17-18	NELI Employment Law Conference	Washington, DC
May 24-25	NELI: Employment Law Conference	Las Vegas, NV
July 11	NELI California Employment Law Update	San Diego, CA
July 12-13	NELI Employment Law Update	San Diego, CA
July 19-20	NELI Employment Law Update	Chicago, IL
July 26-27	NELI Employment Law Update	Washington, DC
Aug. 16-17	NELI Public Sector EEO and Employment Law Update	San Francisco, CA
Aug. 23-24	NELI Public Sector EEO and Employment Law Update	Washington, DC
Nov. 1-2	NELI Employment Law Conference	Chicago, IL
Nov. 6-9	NELI Employment Law Conference	Austin, TX
Nov. 15-16	NELI Employment Law Conference	Washington, DC
Nov. 29-30	NELI Employment Law Conference	San Francisco, CA
Dec. 6-7	NELI Employment Law Conference	New Orleans, LA

(Pub. 1239)

SUBSCRIPTION QUESTIONS?

If you have any questions about the status of your subscription, please call your Matthew Bender representative, or call our Customer Service line at 1-800-833-9844.

ATTENTION READERS

Any reader interested in sharing information of interest to the labor and employment bar, including notices of upcoming seminars or newsworthy events, should direct this information to N. Peter Lareau, 61113 Manhae Lp., Bend, Oregon 97702, e-mail: nplareau@gmail.com, or Mary Anne Lenihan, Legal Editor, Labor & Employment, LexisNexis Matthew Bender, 230 Park Avenue, 7th Floor, New York, NY 10169, maryanne.lenihan@lexisnexis.com.

If you are interested in writing for the BULLETIN, please contact N. Peter Lareau via e-mail at: nplareau@gmail.com or Mary Anne Lenihan via e-mail at: maryanne.lenihan@lexisnexis.com.

(Pub. 1239)

Lexis Advance® Labor & Employment Practice Page

Find top labor and employment sources as soon as you sign in. The **Lexis Advance® Labor & Employment Practice Page** brings your trusted, go-to employment sources to the first screen you see—comprehensive primary sources (cases, codes and regulations); authoritative analysis, practical guidance and expert commentary; plus relevant and trusted news you can't find elsewhere. Designed specifically for labor and employment practitioners, you can see the sources you count on and discover what else can help you, even tools beyond Lexis Advance, before your first click. Add your own favorite or often-used sources to the page for even faster access. Lexis Advance Labor & Employment Practice Page … **Cut right to the chase.**

EXCEPTIONAL CONTENT

Get the best information to work from—authoritative LexisNexis® resources, coupled with expertise from veteran authors and legal editors who specialize in labor and employment law.

- **Powerhouse treatises**—Rely with confidence on more than 75 authoritative treatises covering nearly every niche topic within labor and employment law, including **Matthew Bender®** titles such as *Larson on Employment Discrimination*, *Labor and Employment Law*, *ADA: Employee Rights and Employer Obligations*, and *Wages and Hours: Law and Practice*. Take advantage of expertise from Littler Mendelson and Xpert HR with sources written by top attorneys and designed to make the law accessible and practical.
- **Monitor the current state of labor and employment law** with immediate access to a vast catalog of primary-law content including cases, full-text labor arbitration decisions and agency materials, as well as the high-quality analysis provided with *Shepard's*® Citations Service. Spend less time finding, and more time analyzing, with immediate access to federal and state statutes and regulations and 50-state surveys.
- **Better news, better insights** from an **exclusive combination of top daily news sources** including *The Wall Street Journal*®, *The New York Times*® and Mealey's™ *Daily News: Labor and Employment*, plus timely analysis and commentary on breaking labor and employment news from Law360®, *Bender's Labor & Employment Bulletin* and *Employment Law: Mealey's™ Litigation Report*.

EXPERT ORGANIZATION

Start working faster with better direction. LexisNexis editors review the deep resources across LexisNexis and ensure the most relevant labor and employment sources are at the top of the page. **You uncover the best labor and employment resources—the ones most likely to help you—in the least time.**

- **Top titles stay within reach**. Most-used and best-regarded labor and employment sources—primary law, treatises, daily industry news and more—are in your sightline. Click once and go.
- **Uncover the unexpected.** What you don't know *can* hurt you. The Labor & Employment Practice Page brings you the best possibilities, including resources you didn't know existed.
- **Need a bigger picture? You've got it—A to Z.** Select **View all sources** and get a full, alphabetical listing of LexisNexis labor and employment resources. *You can be confident you don't miss a thing*.
- **Research a legal topic—no search needed.** No extra steps either. **Key legal topics** for labor and employment practitioners are right on your page. Select and review results.
- **Make it your page.** Add other most-used sources or your source combinations to the easy-to-access **Favorites pod**.

EXCLUSIVE TOOLS

Leverage the differentiators, i.e., Lexis Advance tools that help you dig deeper faster, tools no other online publisher offers.

- **Get more of what you need for transactional work.** **Lexis Practice Advisor® Labor & Employment module*** provides step-by-step practical guidance on labor and employment related transactional matters and issues, plus with model forms drafted by leading practitioners, you can quickly customize documents for specific client situations.
- **Get built-in research help.** The **red search box** offers legal phrase suggestions and points you to popular labor and employment cases and statutes as you enter your search. Plus your search is automatically filtered to your practice area.
- **Select a case passage—and uncover connections.** No search or cite is needed with **Legal Issue Trail™**, exclusive to Lexis Advance. Pinpoint cases that reference a passage you select, revealing connections you may not see otherwise.
- **Work anytime, anywhere on practically any device.** Screens for Lexis Advance Practice Pages **adapt automatically** to fit the size of your device. (And you can print easily with a Safari® plug-in.) No apps needed.

**Requires additional subscription.*