

Recent Developments in Labor and Employment Law

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Sexual Harassment in the Post Harvey Weinstein and #MeToo Era

Sexual Harassment

- Ongoing accusations coming out of Hollywood and Washington DC are shocking; not just because of what the harassers allegedly did, but also because of how long they allegedly did it before being caught.
- In some cases, the allegations date back decades.

The Weinstein effect

- Whistleblowers have brought down powerful public figures, which has empowered others to tell their own stories
 - #MeToo
 - #TimesUp
- Two possible risks for employers
 - Heightened sensitivity to potentially offensive behavior at all levels
 - Long-overdue report of an individual that may have a history of bad behavior, but was protected

Not business as usual

- Employment law cyclical in nature, but the last six months have been unique
- Many claims being tried in the Court of Public Opinion, usually through social media
 - Even if claim is stale from a legal point of view
 - Even if a previous settlement/waiver/confidentiality agreement is in effect

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Not business as usual *(cont'd)*

- Employees and the public are expecting immediate action, especially if the organization is in the public eye
- Bottom lines are being threatened
 - Business partners, vendors and customers are being subjected to public pressure to cease doing business with entities that are facing a public accusation of sexual harassment

Not business as usual *(cont'd)*

- Executive-level employees no longer seen as “untouchable”
- Companies no longer finding protection behind settlement and confidentiality agreements
 - Agreements criticized, at a minimum
 - Social media users treating them as affirmative evidence of guilt

How should you respond?

- From a legal standpoint
 - Standard responses to allegations of harassment and discrimination may need to be re-examined
 - Case-by-case analysis required
- From a public relations standpoint
 - What if the allegations become public?
 - Social media makes everyone a target for publicity – both fair and unfair – without the protections of professional journalism

Sexual Harassment

- **We have also seen a backlash against the use of confidential settlements and non-disclosure agreements.**

Sexual Harassment Settlements

- The 2018 Tax Cuts and Jobs Act includes a little-noticed provision regarding deductions related to the settlement of sexual harassment claims.
- The Act provides:
 - No deduction shall be allowed for any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement; or
 - For attorney's fees related to such a settlement or payment."

Sexual Harassment

- **The Acting Director of the U.S. Equal Employment Opportunity Commission has stated that the agency will soon be releasing a revision to its decades-old enforcement guidance on sexual harassment.**

Implications for Employers

- **More difficult to investigate**
- **More difficult to resolve**
- **As much a Public Relations Issue as a Legal Issue**
 - **Manage press and social media**
 - **Decide appropriate use of confidentiality provisions**

Transgender Employees and Claims of Discrimination

Transgender Employees and Discrimination Claims

- **Last November, a jury in federal court in Oklahoma City awarded \$1.1 Million to a transgendered professor who was denied tenure and promotion by Southeastern Oklahoma State University.**

Tudor v. Southeastern State

- *Tudor v. Southeastern State University of Oklahoma et al.*
- Dr. Rachel Tudor, a male-to-female English professor, worked for Southeastern in Durant, Oklahoma, as a tenure track assistant professor from 2004 to 2011.

Tudor v. Southeastern State

- When Dr. Tudor began working for Southeastern in 2004, she presented as a man and went by a traditionally male name.
- In 2007, Dr. Tudor notified Southeastern that she planned to transition from male to female and begin to present as a woman at work.

Tudor v. Southeastern State

- At that point, Dr. Tudor began wearing women's clothing, styling her hair in a feminine manner, and going by the female name Rachel.
- At Southeastern, tenure track assistant professors must obtain tenure before the end of their seventh year or their employment is terminated.

Tudor v. Southeastern State

- Despite recommendations from faculty committees, the Dean of Arts and Sciences opposed tenure. The Vice President of Academic Affairs agreed.
- Dr. Tudor did not secure timely tenure, and her employment was terminated.

Tudor v. Southeastern State

- Dr. Tudor alleges that she was subjected to sex discrimination when she was denied promotion and tenure. She says that Southeastern retaliated against her for complaining about the discrimination.

Tudor v. Southeastern State

- She filed a charge of discrimination with the U.S. Department of Education Office for Civil Rights, who referred her complaint to the EEOC for investigation.
- The EEOC found Dr. Tudor was the victim of sex discrimination and retaliation and referred the charges to the U.S. Department of Justice for litigation.

Tudor v. Southeastern State

- The University sought summary judgement on the grounds that Tudor was not entitled to protection under Title VII because her status as a transgender person is not a protected class.
- The district court recognized The Tenth Circuit's holding was that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."
- However . . .

Tudor v. Southeastern State

- The court went on to hold that Tudor could present her claims to a jury because:

“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”

Sexual Orientation Discrimination

- Title VII prohibits employment discrimination because of “sex,” but does not expressly define that word.
- Nor does the act expressly mention sexual orientation.

Sexual Orientation Discrimination

- Employees have often argued that the word “sex” should be interpreted as including sexual orientation, but most courts that have examined that argument have held that Congress did not intend for the distinct concept of sexual orientation to be included in Title VII.

Sexual Orientation Discrimination

- A few courts have recognized claims under Title VII for stereotyping individuals into traditional gender roles (as the Tudor court did with respect to transgender employees), but the courts have not gone so far as to apply Title VII to sexual orientation directly.

Sexual Orientation Discrimination

- In 2016, the EEOC took the position that the courts have been wrong.
- The agency announced that in all future cases, the EEOC would argue that “sexual orientation” discrimination is prohibited by Title VII via its ban on “sex” discrimination, and no amendment to Title VII is necessary to make those claims actionable.

Hively v. Ivy Tech Community College

- In 2017, one appellate court finally embraced that trend and reexamined the legal theory.
- In *Hively v. Ivy Tech Community College*, the Seventh Circuit held, for the first time, that a claim of discrimination by an employee based solely on his or her sexual orientation could be maintained under Title VII.

Hively v. Ivy Tech Community College

- Essentially, the appellate court reinterpreted the word “sex” in Title VII and decided that changing moral beliefs of the country justified a different interpretation of Title VII, now more than 50 years old.

Zarda v Altitude Express

- Earlier this year, the Second Circuit joined the Seventh Circuit and added sexual orientation to the list of prohibited bases of discrimination in employment under Title VII.
- In a divided en banc decision, *Zarda v Altitude Express*, the plurality overruled its prior precedent and held sexual orientation discrimination constitutes a form of “sex” discrimination under Title VII.

Sexual Orientation Discrimination

- Other courts have stayed the course, ignoring the EEOC and the apparent societal trend.
- Those courts have noted that an early 1960's Congress clearly did not intend for sexual orientation to be covered by the law, and that the proper venue for changing an act of Congress is Congress itself.

Sexual Orientation Discrimination

- In December, 2017, the U.S. Supreme Court passed on an opportunity to provide some long-awaited clarity on the interplay between sexual orientation and Title VII and declined to review the decision in *Hively*.

Sexual Orientation Discrimination Under Title IX

- The federal agencies charged with implementation and enforcement of Title IX, the [U.S. DOJ](#) and the [U.S. DOE](#), currently take the position that Title IX does not extend to discrimination on the basis of sexual orientation.
- In February 2017, both agencies issued a “Dear Colleague” letter withdrawing the Obama administration’s policy and guidance interpreting Title IX to bar discrimination on the basis of a student’s gender identity.

Sexual Orientation Discrimination Under Title IX

- Additionally, the January 2001 Title IX guidance to which the DOE reverted back in its Sept. 22, 2017, Dear Colleague letter, specifies that
 - “Title IX does not prohibit discrimination on the basis of sexual orientation.”
- The department’s Office of Civil Rights is no longer taking discrimination cases based on sexual orientation.

Sexual Orientation Discrimination Under Title IX

- Despite the pronouncements of the DOJ and DOE, Federal courts who have extended sexual orientation protection under Title VII are unlikely to adopt the positions of the DOJ and DOE about the scope of Title IX.

The Takeaway

- While Title VII does not explicitly prohibit discrimination against individuals based on sexual orientations or transgender status, courts recognize these cases as traditional gender discrimination cases – the so-called “stereotypical gender roles” theory.
- Also, employer should be mindful that a variety of state and local laws provide protection based on orientation and transgender status, as do some contractual provisions.

Medical Marijuana and Workplace Drug Testing

Is Medical Marijuana Coming to an Office Near You?

- On June 26, voters soundly approved State Question 788, legalizing medicinal marijuana use in Oklahoma.

Medical marijuana licenses

- Only covers those individuals who hold a valid, Oklahoma-issued medical marijuana license
- Must be an Oklahoma resident
- 18 years or older; If under 18, application must be signed by parent and two physicians
- License good for two years
- \$100 application fee

Medical marijuana licenses *(cont'd)*

- Temporary licenses available for non-residents who are a “medical marijuana license holder from other states [with] a state regulated medical marijuana program”; substantially equivalent to Oklahoma’s license program

Licensing process

- Oklahoma Medical Marijuana Authority
- Application for license available on the Oklahoma State Department of Health website as of 7/26/18
- Will not receive or process until 8/25/18
- Approves or rejects an application within 14 days of receiving the application
- Website and telephone system to validate authenticity of a medical marijuana license

Application signed by physician

- Must be Oklahoma Board-certified physician – doctor of medicine (M.D.) or doctor of osteopathic medicine (D.O.)
- Must complete training for the recommendation of medical marijuana
- “[R]ecommended according to the accepted standards a reasonable and prudent physician would follow when recommending or approving any medication”

Physician standards

- Bona fide physician-patient relationship
- In-person medical assessment
- Diagnosis of a medical condition
- Must discuss with patient marijuana risks and instructions for use

License holders' rights

- Consume marijuana
- Possess
 - 3 ounces on their person
 - 8 ounces in their residence
 - 6 mature plants
 - 6 seedlings
 - 1 ounce of concentrate
 - 72 ounces of edibles

Note: Licenses not valid on tribal or federal lands

Federal Law

- Controlled Substance Act (“CSA”) – Marijuana classified as a Schedule I drug
- January 4, 2018 - DOJ memo to all U.S. Attorneys
 - Rescinds prior guidance giving U.S. Attorneys discretion enforcing federal marijuana-related offenses
 - Increased willingness to prosecute marijuana-related offenses
 - Potential clashes between federal and state enforcement efforts

Federal Law *(cont'd)*

- Federally mandated drug testing – Federal contractors, transportation, defense employers
- Example: Department of Transportation notice (updated 10/30/17)
 - DOT-regulated drug testing not changed by state laws permitting medical marijuana
 - DOT MROs will continue to treat a drug test as “positive” for medical marijuana users
 - DOT requires testing, but does not set employment consequences, other than requiring the employee to cease performing safety-sensitive duties

Does Federal Law Preempt Inconsistent State Laws?

- Oregon (2010) – Federal CSA preempted state law authorizing medical marijuana
- Connecticut (2017) – State medical marijuana law not preempted by CSA

Required Accommodation of Medical Marijuana *(cont'd)*

- **ADA and Oklahoma Discrimination in Employment Act – Current illegal drug users not considered “disabled” or protected by the ADA**
- **Oklahoma State Question 788 – not addressed**

Legal challenges

- Enabling regulations
- Lawsuits challenging OSDH rules
- Possible: State legislature takes action on SQ 788 and the Oklahoma Standards for Workplace Drug and Alcohol Testing Act
- Possible: Ruling that federal law prohibiting the use of marijuana preempts SQ 788

Employment protections for license holders

- Employers may not **discriminate** against or **penalize** an employee or applicant based upon their medical marijuana license status
- Employers may not take any action against a license holder based solely on a positive drug test for marijuana

Exceptions to employment protections

- **Exception:** These employment protections do not apply to employees who are subject to federally mandated substance testing requirements
- **Exception:** May discriminate if employer would “imminently lose a monetary or licensing related benefit under federal law or regulations”

New protected class for license holders?

- No discrimination against an individual and no penalizing an individual based upon their license-holder status

Challenge for employers:
May lead to wrongful discharge lawsuits

Lawful workplace restrictions

- May not **possess** marijuana while at work or “during the hours of employment”
- May not **use** marijuana while at work or “during the hours of employment”
- May not be **impaired** while working

Challenge for employers:
Establishing or testing for “impairment”

Updating drug and alcohol testing programs

- Need to continue to test for all substances, including marijuana
- May not know what particular substance contributed to behavior or accident
- If not a valid medical marijuana license holder, a positive test for marijuana for an employee or applicant can result in employment action
- Define prohibited drugs to include substances that are illegal under Oklahoma or federal law – preemption issue

Marijuana testing

- Marijuana testing challenges
 - Can't determine "an individual's impairment"
 - Can't determine how long ago consumed
- MROs will report positive marijuana tests and leave it up to employer
- Do not ask applicants or employees if they are license holders unless/until they test positive
- Ability to take employment action after a positive test will be determined on a case-by-case basis

Strengthen workplace policies

- Do not ask whether an individual is a license holder unless/until they test positive for marijuana
- An absolute prohibition of **possession** of any prohibited substances **while working**
 - Includes license holders
 - Covers areas outside the employer's building
 - Covers off-premises possession while working

Strengthen workplace policies

(cont'd)

- An absolute prohibition of **use** of any prohibited substances **while working**
 - Includes license holders
 - Covers areas outside the employer's building
 - Covers off-premises possession while working

Strengthen workplace policies

(cont'd)

- An absolute prohibition of working while **impaired or under the influence** of an prohibited substances
 - Includes impairment of license holders from marijuana use
 - Covers impairment observable from appearance, behavior or conduct

Strengthen workplace policies

(cont'd)

- Shifts from relying upon a positive test result to making decisions based upon an employee's appearance, behavior and conduct
- Stress that violation of these policies may result in termination
- Important that your policies are direct and clear, so as to deflect claims of "no notice" or misunderstanding

Educate your workforce

- Employees have received misinformation about how the new law works
 - What rights are granted
 - What prohibitions still apply
- An opportunity to review with employees your new, more robust possession, use and impairment policies
- Walk through your drug testing policy – how it works and how it still applies

Train your supervisors

- Dealing with medical marijuana issues on a daily basis
- Likely to get questions from employees about marijuana use in the workplace
- How SQ 788 works – and doesn't work – particularly in conjunction with your new workplace policies and drug testing program
- Responsible for applying and executing these policies
- Training that increases their skills at recognizing and documenting impairment

Takeaways

- Update and make more robust your possession, use and impairment policies
- Fine tune your drug and alcohol testing program
- Tell your employees what they can and cannot do, when it comes to medical marijuana
- Train your supervisors to help you keep your workplace safe

**Recent
Tenth Circuit
Employment Law Cases**

Americans with Disabilities Act

(42 U.S.C. §§ 12101 – 12213)

Bright v. University of Oklahoma Board of Regents, No. 17-6101 (10th Cir., 2017)

- Bright sued OU's Board of Regents, claiming violations of the ADA. The district court granted the board's motion to dismiss the case.
- The court concluded that Bright's ADA claim was barred by sovereign immunity. She appealed the ruling to the 10th Circuit

Bright v. University of Oklahoma Board of Regents, No. 17-6101 (10th Cir., 2017)

- The 10th Circuit affirmed the dismissal.
- The Court noted that because Congress hasn't repealed sovereign immunity from ADA liability for the states, most state agencies, including state universities, are shielded from ADA liability.
- The Rehabilitation Act, also prohibits disability discrimination, and now provides remedies similar to those under the ADA. The Rehabilitation Act would apply if the state agency or entity is receiving federal funds.

Equal Employment Opportunity Commission

EEOC v. College America Denver, Inc.

869 F.3d 1171 (10th Cir. 2017) (Bacharach)

- EEOC filed action alleging that an employer's lawsuit against a former employee for breach of a settlement agreement was unlawfully interfering with statutory rights of the employee and the EEOC
- EEOC appealed district court's dismissal of the EEOC's unlawful interference claim
- Tenth Circuit **reversed** and **remanded**, holding that the EEOC's unlawful interference claim was not moot

EEOC v. TriCore Reference Laboratories

849F.3d 929 (10th Cir. 2017) (Matheson)

- EEOC petitioned for enforcement of an administrative subpoena, seeking information from employer related to employee's charge of pregnancy and disability discrimination in violation of Title VII and the ADA
- EEOC appealed after district court denied the petition

EEOC v. TriCore Reference Laboratories

849F.3d 929 (10th Cir. 2017) (Matheson)

- Tenth Circuit **affirmed**, holding:
 - EEOC did not demonstrate a basis to expand its investigation, as required to justify its subpoena seeking information to determine whether there was a pattern or practice of disability discrimination
 - EEOC failed to demonstrate relevance of its subpoena request for information about other employees who were pregnant during their employment and whether the other employees sought or were granted accommodations
 - EEOC’s subpoena request seeking information about other pregnant employees who did not request an accommodation was overbroad

Questions?

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