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2016

The Year in Review

Presented by:
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Sexual Orientation Discrimination


The Writing is on the Wall—Is That Enough?


- The EEOC has said that firing someone based on sexual orientation is sex discrimination.
Baldwin v. Foxx, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015)
- The 7th Circuit may soon agree.



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Sexual Orientation Discrimination

The Writing is on the Wall—Is That Enough?

- **July 28, 2016:**
The 7th Circuit held that sexual orientation is beyond the scope of Title VII.
 - The 7th Circuit noted that the writing may be on the wall, “[b]ut writing on the wall is not enough. Until the writing comes in the form of a Supreme Court opinion or new legislation, we must adhere to the writing of our prior precedent.” *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016)
- **By October 11, 2016:**
The 7th Circuit set aside its own ruling, agreeing to rehear the case en banc.
Matthew Bultman, *Full 7th Circ. To Hear Sexual Orientation Bias Row*, Law360 (October 11, 2016)

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Sex Discrimination





- **Title IX**
 - Women’s basketball coach awarded \$3.36 Million in California sex discrimination and retaliation suit.
 - The former coach’s termination followed her protests that men’s athletics were treated more favorably than women’s.

Suevon Lee, Ex-SDSU Coach Who Fought Title IX Inequality Nets \$3.3M Win, Law360 (10/03/2016)

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Sex Discrimination (continued)


- **Rescinding Employment Offer**
 - After receiving an offer of employment, new hire disclosed pregnancy.
 - Employer responded, stating “we appreciate you telling us beforehand,” and rescinding her offer.
 - EEOC filed suit in July, 2016.




Maureen Minehan, Employer in Hot Water After Rescinding Offer to Pregnant Employee, Thomson Reuters Employment Alert, vol. 33, issue 18 (September 2, 2016)

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Religious Discrimination

- **“Onionhead” is a Religion**
 - EEOC action claimed that employer imposed upon its employees “Onionhead” or “Harnessing Happiness.”
 - The Onionhead program, developed and implemented by the aunt of the CEO, involved “discussions about God, spirituality, demons, Satan, divine destinies, the ‘Source,’ purity, blessings, and miracles.”
 - The employer argued that the program was a “a multi-purpose conflict resolution tool,” while employees believed it to be a religion, claiming that they were terminated for rejecting Onionhead beliefs or for maintaining their own religious beliefs.
 - The court determined that Onionhead is a religion for the purposes of Title VII.



EEOC v. United Health Programs of Am., Inc., No. 14-CV-3673 (KAM)(JO), 2016 U.S. Dist. LEXIS 136625 (E.D.N.Y. Sep. 30, 2016)

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Religious Discrimination

- **Flu Shot Exemption: Religious Accommodation**
 - Philadelphia Hospital sued by EEOC after firing 6 employees who refused a mandatory flu shot, seeking a religious exemption.
 - Fired despite policy that provided religious or medical exemptions, and allowed face masks as an accommodation.

Dan Packer, EEOC Says Hospital Denied Religious Vaccine Exemptions, Law360 (September 23, 2016).



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Religious Discrimination *(continued)*

- **Flu Shot Exemption: Without Religious Reason**
 - Hospital required flu shot with exemptions based on religious beliefs.
 - Hospital worker was not allowed to pursue religious bias claim when she refused a flu shot for non-religious reasons because she did not belong to a protected class.

Brown v. Our Lady of Lourdes Med. Ctr., No. A-4594-14T2, 2016 N.J. Super. Unpub. LEXIS 2177 (Super. Ct. App. Div. Oct. 3, 2016).



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Race Discrimination

- **Dreadlocks Ban Permitted:**
 - “[D]iscrimination on the basis of black hair texture (an immutable characteristic) is prohibited by Title VII, while adverse action on the basis of black hairstyle (a mutable choice) is not.”

EEOC v. Catastrophe Mgmt. Solutions, 26 Fla. L. Weekly Fed. C 782 (U.S. 11th Cir. 2016).

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Age Discrimination


- **Photos of “Ideal” Employees Indicate Age Bias:**
 - EEOC cites to photos of “ideal employees” sent to managers as indicating a preference for young, white female employees.
 - One human resources director reportedly stated to a former employee, “All you have to do is walk in the front door of one of our restaurants and see what people look like.”
 - Unsuccessful job applications contained comments such as, “old.”

Matthew Bultman, EEOC Raises ‘Smoking Gun’ In Texas Roadhouse Bias Row, Law360 (September 16, 2016).

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Age Discrimination (continued)

- 22.5% of EEOC charges in the last fiscal year were claims of age discrimination.
 - Claims resulted in \$99.1 million in monetary benefits obtained by the EEOC for the claimants.
- **Avoiding Age Discrimination:**
 - Review how you've treated other—especially younger—employees for similar misconduct before disciplining or firing employees over age 40.
 - Train your supervisors to avoid age-related comments.
 - Focus on the employee's job performance over age.







Steven Gutierrez, Lessons in Proactively Avoiding Age Discrimination, Law360 (October 12, 2016).

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Disability Discrimination


- **Diabetic Employee Allowed to Drink Orange Juice**
 - Diabetic cashier drank an orange juice to offset symptoms of hypoglycemic episode, then paid for the drink after the emergency had passed.
 - Fired for violating store's "anti-grazing policy."
 - Awarded \$277,565.
 - Employer failed to accommodate disability when it previously refused to let her keep juice nearby at the cash register and when it terminated her employment because of her disability.




Kevin McGowan, Fired Diabetic Dollar General Cashier, Wins \$278K ADA Verdict, Bloomberg BNA (September 19, 2016).

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Disability Discrimination (continued)


- **Obesity Not an Impairment**
 - Employer rescinded conditional offer because of plaintiff's obesity.
 - Ninth Circuit determined that his obesity was not extreme enough to qualify as an impairment under Montana law.
 - Montana Supreme Court previously determined that obesity must be "severe" (body weight more than 100% over the norm) to qualify as an impairment.
 - At 220 pounds, plaintiff's weight determined to be within normal range, and therefore, was not an impairment.




Kelly Knaub, 9th Circ. Asked to Rehear Ruling Obesity is Not an 'Impairment', Law360 (September 23, 2016).





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Handling Workplace Disability Issues

- **Tips for Supervisors:**
 -  ADA reasonable accommodation obligation requires preferential treatment.
 -  Individual supervisors should not independently make the decisions regarding accommodation or determination of undue hardship—encourage supervisors to involve HR or the legal team as soon as possible in the process.
 -  Expediting the interactive process will help defend against future discrimination claims—be quick, but effective.
 -  Keep the employee's medical information private—don't seek it unless you need it.

Katarina E. Klenner, *NELI Offers Best Practices for Handling Workplace Disability Issues*, Law360 (September 29, 2016)


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SEC Enforces Whistleblower Case



- Section 21F of the Exchange Act prohibits retaliation against whistleblowers who report potential violations to the SEC or otherwise assist in an enforcement action.
- The SEC, though it did not allege a violation of securities laws, pursued the whistleblower retaliation claim, imposing a civil money penalty in the amount of \$500,000.

In the Matter of International Game Technology, 2016 SEC LEXIS 3688



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Contractor Sick Leave

- The Department of Labor has issued its final rules implementing President Obama's Executive Order 13706 requiring federal contractors and subcontractors to provide certain employees with up to 7 days paid sick leave annually.
- The rules, among other things:
 - Require coverage for certain contracts awarded or renewed effective January 1, 2017.
 - Define eligible employees and contractors.
 - Define acceptable accrual methods for paid sick leave.
 - Require payment of unused sick leave upon termination.



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Employee Recruiting Practices

- Potential Lawsuits stemming from employee recruiting practices:
 - Discrimination/Failure to Hire.
 - Negligent Hiring.
 - Breach of Implied Contract.
 - Invasion of Privacy.
 - Intentional/Negligent Infliction of Emotional Distress.



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Employee Recruiting Practices


(continued)


- **Employer Tips:**
 - Job postings should be concise and neutral when stating job requirements.
 - Consider linking your company website to the posting rather than describing the company in the posting.
 - Avoid screening applicants on social media if it is not relevant to the applicant's position.
 - Make sure hiring managers are trained and work with HR.




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EEOC on Retaliation





EEOC Enforcement Guidance on Retaliation and Related Issues (Aug. 29, 2016):

- **Employer Takeaways:**
 - Both participation and opposition are considered protected activities.
 - The law protects more than just employees.
 - Complainants should still be expected to perform their jobs.
 - A combination of evidence can support retaliation claims.
 - Employers must prevent ADA interference as well.
 - Effective practices such as written policies, adequate training, and proactive follow-up and support can prevent claims.

Maureen Minehan, Six Important Takeaways from New EEOC Retaliation Charge Guidance 19


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Workplace Investigations

- Second Circuit held that “Cat’s Paw” theory of employer liability applies to Title VII claims.



 - Second Circuit extended Cat’s Paw liability to include situations in which the decisionmaking process is influenced by a coworker with discriminatory animus.
 - An employer is liable under Title VII when, “through its own negligence, the employer gives effect to the retaliatory intent of one of its—even low-level—employees.”

Patrick Dorrian, *Watch Out for Witness Bias in Workplace Investigations*, Bloomberg BNA (September 1, 2016). 20

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