Threats and Opportunities:
Employment and Labor Law Briefing 2018

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Prepared for

PACAH

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**No statements made in this seminar or in the written materials/ power point should be construed as legal advice pertaining to specific factual situations.*

- Managers and HR Professionals must continue to stay up to date with the continued changes and developments in employment and labor laws.

- This presentation will examine some of those recent changes and developments in the law.

New Labor Cases

The Supremes—No Not *Those* Supremes

In *Janus v. American Federation of State, County, and Municipal Employees, Council 31* (Case No. 16-1466), the Court has agreed—again—to take on the question of whether public-sector employees can be forced to pay union dues as a condition of their employment. The plaintiff in *Janus* seeks to overturn the Supreme Court's 1977 decision in *Abood v. Detroit Board of Education*, which held that that public school teachers can be required to pay their fair share of the costs the union is required by law to incur in negotiating and administering collective bargaining agreements on behalf of all teachers it represents, even though teachers cannot be required to join a union or contribute to its lobbying expenditures. The Court will consider whether this type of arrangement (known as an "agency shop") violates the First Amendment rights of public-sector employees, who may not personally support the union but are forced to fund its efforts.

The Supremes—No Not *Those* Supremes

Interestingly, the same challenge to *Abood* was posed to the court just last year, in *Friedrichs v. California Teachers Association*. The court heard oral argument in that case in January of 2016.

The Court's more conservative justices, led by Justice Scalia, appeared ready and willing to overrule *Abood*.

Justice Scalia died suddenly only a few weeks later, however, before the Court announced a decision. Stymied by a 4-4 tie among the remaining justices, the Court abandoned the issue, leaving the lower court's ruling (which followed *Abood*) intact. Justice Gorsuch, who filled Justice Scalia's seat, is likely to follow in his predecessor's footsteps. As a result, the Court may be poised to overrule *Abood*. This would be a significant blow to labor unions.

Oral argument was held in February 2018. Justice Gorsuch did not ask any questions or otherwise give insight on his position.

A Delicate Subject

Do Title VII's protections against sex discrimination include protections against sexual orientation discrimination?

Second Circuit recently addressed a dispute over whether Title VII's protections against sex discrimination include protections against sexual orientation discrimination.

Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. He regularly participated in tandem skydives, strapped to clients. His co-workers routinely referenced his sexual orientation and made sexual jokes around clients, and Zarda told female clients about sexual orientation to assuage any concerns about being strapped to a man to skydive.

Zarda told a female client that he was gay, and the female client alleged Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. Client told her boyfriend, who then told Zarda's boss. Zarda was fired. Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

- Zarda argued that he has a federal claim under Title VII, and his former employer argued that Title VII does not allow for such claims and that his complaint should be dismissed.
- United States Department of Justice (DOJ) filed an amicus brief taking the position that Title VII does not protect employees against sexual orientation discrimination. The DOJ argued that sex and sexual orientation are different under the current statutory language of Title VII and "[a]ny efforts to amend Title VII's scope should be directed to Congress rather than the courts."
- The EEOC filed an amicus brief taking position "sexual orientation is inherently a sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."
- Twelve other amicus briefs were filed with the court.

•In February, 2018, the Second Circuit Court of Appeals ruled that Title VII forbids sexual orientation discrimination because it is a form of sex discrimination. Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir. February 26, 2018) (en banc).

•Now a circuit court spit on this issue:

Eleventh Circuit declined to recognize a sexual orientation claim under Title VII. Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) (en banc).

Seventh Circuit held that discrimination on the basis of sexual orientation is a form of sex discrimination. Hively v. Ivy Tech Cmty Coll. Of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc).

•Other Circuits may hear similar questions of law unless and until the Supreme Court hears and settles the issue.

What is an employer to do when the DOJ, which enforces the laws of the U.S., says employers may discriminate on the basis of sexual orientation, and the EEOC, which enforces the anti-discrimination laws of the U.S., says employers may not discriminate on the basis of sexual orientation?

Although it is important to keep an eye on changing policies in the EEOC and DOJ, it is equally important to know the laws of your jurisdiction. Almost half of all states and many counties and municipalities prohibit discrimination on the basis of sexual orientation. So, even if employers are in a jurisdiction where federal law is not interpreted as a bar to sexual orientation discrimination under Title VII, the employer may still face litigation and liability under state or local law.

With that said, the EEOC's stance on the issue is relevant to employers since the EEOC enforces Title VII.

Given that there is a circuit court split, that the circuit courts have been hearing these cases "en banc," the number of parties submitting amicus briefs on this issue, and the views of the DOJ and EEOC, there is a good chance this issue will end up before the Supreme Court.

Another Delicate Subject

Affirming that breastfeeding is a medical condition related to pregnancy and that the police department's conduct violated the Pregnancy Discrimination Act (PDA), a federal appeals court in Atlanta has upheld the jury's verdict for a former Tuscaloosa, Alabama police officer. *Hicks v. City of Tuscaloosa, Alabama*, 870 F.3d 1253 (11th Cir. Sept. 7, 2017). Stephanie Hicks was awarded $374,000 in damages against the police department for pregnancy discrimination due to breastfeeding.

Trouble started for Hicks immediately after she returned from maternity leave. She was provided with only one option as a place to pump at work: an unsanitary and public locker room. She also felt she was constantly under scrutiny regarding her whereabouts during her pumping breaks. Even as she headed down to the locker room to pump, she would hear taunting, such as "wrap those boobs up" on her police radio.

Making matters worse, the police department began writing her up for what she believed were minor issues. Hicks was demoted to a patrol officer a week after her return from leave. This meant she would receive a pay decrease, be assigned to night and weekend shifts, and no longer have a vehicle. As a patrol officer, she also would have to wear a snug-fitting bullet proof vest on duty. Her obstetrician provided her with a doctor's note explaining that the tight vest would reduce her milk supply and place her at risk for infections. In response, the police department told her she had no choice but to wear the vest or risk serious bodily injury. This was the last straw and she resigned.

The 11th Circuit said that Congress intended the PDA to include physiological conditions post-pregnancy and that the PDA would be rendered a nullity if women were protected during a pregnancy, but could be readily terminated for breastfeeding.

The Affordable Care Act requires employers to provide nursing mothers with reasonable break times for expressing breast milk and with a private place to pump, other than a restroom. As a direct result of the verdict, Tuscaloosa's police department and City Hall now have private rooms for nursing mothers; all employers should do the same. Employers are obligated to engage in the interactive process with breastfeeding employees who provide medical documentation to support the need for an accommodation. Finally, employers must have a zero-tolerance policy for harassment or retaliation of nursing employees.

Does This Smell Funny To You?

A California state jury has handed down a $3 million award to a Caltrans (California Department of Transportation) employee in a case alleging harassment by supervisors. John Barrie, a staff services analyst at Caltrans, alleged his supervisors harassed him by intentionally triggering his allergies through exposure to chemicals such as perfumes and cleaning solutions.

Barrie began working at Caltrans in 2005. He informed his supervisor at the time that he had a disability that caused him to have severe reactions to certain chemicals (such as perfumes and cleaning supplies). Barrie's supervisor provided him with an "unofficial" accommodation, which worked well for the next five years. Barrie's supervisor asked his coworkers not to wear perfume, and the cleaning crew was instructed not to use certain supplies such as Windex.

In 2010, a new supervisor took over Barrie's department. The supervisor rescinded Barrie's "unofficial" accommodation. Barrie then requested a formal accommodation, but the "unofficial" accommodation was not reinstated. Perfume and cleaning chemicals were used in his workspace. Barrie's complaint alleged that after he filed an internal complaint his supervisors retaliated against him. For instance, he was transferred to another office without explanation. Barrie was placed in the lobby and asked to perform reception duties, which he viewed as a demotion. Barrie also alleged he was forced to miss out on opportunities to earn overtime.

In 2012, a Caltrans Human Resources representative did a surprise inspection in which they found perfumes and cleaning chemicals had been sprayed in Barrie's office. Instead of vindicating him, this led to further retaliation. According to notes from the investigation, Barrie's supervisors wanted to punish him for going "outside of the chain of command." Another time, Barrie alleged that he came to work to find his lumbar pillow soaked in perfume. Barrie alleged that his supervisor called him "idiot" and "jerk," and that other coworkers accused him of "causing problems."

Barrie filed his lawsuit in February 2013. In May 2017, the jury delivered a $3-million-dollar verdict for Barrie ($44,413 in economic loss, and $3 million in emotional distress). Barrie continued to work for Caltrans, although he worked remotely.

This case is a reminder to employers that employee requests for accommodation must be taken seriously.

The Flip Side Of Bullying

A plaintiff's demand that her supervisor adopt a less overbearing management style was an unreasonable accommodation request under the Americans with Disabilities Act, a federal district court in Florida has found. *Hargett v. Florida Atlantic Univ. Board of Trustees*, 219 F.Supp.3d 1227 (S.D. Fla. Nov. 8, 2016).

The plaintiff, who suffered from epileptic seizures since childhood, worked for the defendant-university as a librarian. She informed the university her seizures were linked to high tension and stress and she considered her job to be a stressful work environment that could cause her to have seizures. She complained that her supervisor was "becoming uniquely rough or harsh" in his treatment of her. The plaintiff alleged her supervisor's bullying and harassment caused her to have frequent seizures at work. As a result, the plaintiff requested the following accommodations: (1) the supervisor "cease his hostile confrontations" with the plaintiff; (2) her supervisor undergo sensitivity training; and (3) to reduce risk of injury from seizure, the university ensure the plaintiff's cubicle did not contain sharp corners. The university accommodated only the third request.

Among several other claims, the plaintiff filed suit alleging the university discriminated against her based on her disability in violation of the ADA because it allegedly failed to provide reasonable accommodations. The university asserted that it accommodated some of her requests and denied only those that were vague and/or unreasonable. The trial court agreed with the university and granted summary judgment for the university on the plaintiff's failure to accommodate claim. It concluded that since some of the plaintiff's requests were vague, the university was not required to consider the requests.

Further, the court stated that the plaintiff could not "immunize herself from stress and criticism" in general and that appeals to work in a more nurturing work environment, *not directed at any particular person*, are not sufficient. Since the plaintiff merely characterized her supervisor's management style as a "series of hostile confrontations" and did not identify any specific stressors caused by the supervisor, the court found her request unreasonable and granted the university's summary judgment motion on the plaintiff's failure to accommodate claim.

Key to the court's decision was the plaintiff's inability to identify specific actions taken by her supervisor that allegedly caused her to have frequent seizures at work.

This case shows the importance to employers (through their counsel during a plaintiff's deposition and at trial) of questioning a plaintiff for specifics regarding any requests for accommodation.

Vague or conclusory statements, instead of specific actions an employer can take, could be unreasonable.

Data Breaches And Employers

What's in Your Wallet?

Some employers may be surprised to learn that they could be responsible for a vendor's breach. A common misconception about data breaches is that *only* the breached organization has legal obligations with respect to the breach.

To the contrary, when a business vendor suffers a data breach involving data that the vendor has created or received on the employer's behalf, data breach notification laws impose ultimate responsibility for breach response on the employer. The vendor's statutory responsibility is generally limited to informing the employer of the breach.

What's In Your Wallet?

State data breach notification laws generally require notice to affected individuals as a result of the unauthorized acquisition of unencrypted personal information.

Personal information typically is defined to include first name or initial and last name plus (i) Social Security number, (ii) driver's license number and/or state identification number, or (iii) credit or debit card number or financial account number in combination with any required password. Some states include additional information in the definition of personal information. Information such as account passwords, health information, and health insurance information may constitute "trigger data" in certain jurisdictions.

What's In Your Wallet?

These laws require breach notifications to the affected individuals. Depending on the state, the breached entity may also have an obligation to notify state attorneys general, state consumer protection authorities and/or the national credit bureaus.

Employers should consider the following steps to help reduce the risks of a security incident involving the employer's data while in the possession of vendors. First, employers should carefully vet the data security policies and procedures of any vendors that will handle data subject to data breach notification laws. Second, employers should consider adding provisions to vendor contracts that pass down the employer's breach response obligations to the vendor.

What's In Your Wallet?

Before entrusting the vendor with personal information, the employer should execute a contract with the vendor that addresses the parties' obligations and rights regarding personally identifiable information. At minimum, the vendor contract should stipulate that the vendor:

- promptly notify the employer of a data breach and provide all the information necessary for the employer to provide notifications satisfying applicable law;
- notify affected individuals under the direction of the employer;
- mitigate the harmful effects of a data breach, including reimbursing the employer for all the employer's reasonable costs that result from the vendor's data breach;
- indemnify the employer for all third-party claims arising out of the vendor's data breach;
- maintain insurance that covers data breach response costs and liability for data breaches; and
- return or destroy an employer's data at the end of the engagement.

What's A Guy Got To Do To Get Fired Around Here?

What's It Take To Get Fired

A male ninth grade teacher and visible union activist, who worked for the Neshaminy School District for approximately ten years, was terminated for creating a hostile work environment for his fellow teachers and making lewd and suggestive statements to students. The termination decision stemmed from complaints from a younger co-teacher who alleged the teacher repeatedly directed sexually explicit comments toward her.

Those comments, often made in front of ninth grade students, included inviting the female teacher to sit on his lap, and stating "[so] I shouldn't slap your a[**]." A grievance arbitrator subsequently found that the grievant's continuous behavior had a deleterious effect on the co-teacher and created a hostile working environment, which constituted just cause for imposing a 20-day suspension without pay for acts of harassment against the co-teacher.

What's It Take To Get Fired

However, the arbitrator sustained the grievance in part with respect to the allegedly sexually suggestive comments made to students—asking them to demonstrate "twerking" and lying during the investigation. The arbitrator determined the evidence was contradictory and insufficient to support the district's claim that the teacher knowingly misled his interrogator.

A trial court granted the school district's petition to vacate the award, concluding the award violated the dominate public policy against sexual harassment.

What's It Take To Get Fired

On appeal, the Commonwealth Court affirmed the decision of the lower court, concluding the award fell within the public policy exception to the essence test. The appellate court explained that under this three-pronged test the conduct leading to the discipline must be identified, the conduct must implicate a well-defined dominant public policy, and the arbitrator's award must pose an unacceptable risk that it will undermine the implicated policy. Neshaminy School District v. Neshaminy Federation of Teachers, 171 A.3d 334 (Pa. Cmwlth. 2017).

Here, the arbitrator specifically found that the grievant committed multiple and continuous acts of sexual harassment by directing sarcastic and sexually explicit comments toward a younger first-year teacher, in the presence of ninth grade students. The appellate court explained that the grievant's reinstatement to the classroom despite a finding that he engaged in ongoing sexual harassment of a co-teacher, created a hostile and offensive workplace and posed an unacceptable risk of undermining the clear anti-sexual harassment policy of the school district.

What's It Take To Get Fired

In contrast, the dissent argued that the arbitration award must be afforded great deference and followed. The dissent continued the award granted the school district broad authority "to impose whatever level, form or intensity of sexual harassment training it deems necessary to address [the grievant's] grossly improper conduct," and therefore did not demonstrate blind tolerance of his clearly repellant behavior.

It's *Close* To The Same Plan

Such A Deal We Have For You

A union representing police officers in the Borough of Jim Thorpe filed a charge, alleging the borough employer violated Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act when it unilaterally changed health care, vision and dental benefits. Fraternal Order of Police Lodge 13 Schuylkill-Carbon v. Jim Thorpe Borough, 49 PPER 28 (Pa.L.R.B. Hearing Examiner's Decision dated August 30, 2017).

The change in benefits resulted when the borough council unanimously voted to change the broker used for securing health insurance and to change from the Highmark Self-Insured Plan to the Highmark AffordaBlue Platinum I Bronze Plan, which carried higher co-pays and higher-out-of-pocket expenses due to different in-network providers.

The Borough defended its actions arguing the AffordaBlue Plan health insurance was better than the Self-Insured Plan, which was going to be unavailable in the next plan year. The Borough also claimed that it was not responsible for the change. Consistent with Board policy, the hearing examiner set aside any discussion of the relative merits of one plan over the other, and instead focused on the change in health plans during the status quo period following contract expiration.

Such A Deal We Have For You

In finding that the unilateral change in plans constituted an unfair labor practice, the hearing examiner rejected the Borough's "not-my-fault defense," noting the unavailability of the former plan in 2017 did not relieve the Borough of its obligation to bargain with the union to a mutually agreeable resolution. The hearing examiner explained that allowing such a defense "would excuse public employers from their bargaining obligations simply by identifying external causes for changes in financial or contractual conditions."

Moreover, since the collective bargaining relationship runs between the Borough and the union, and the insurance company is not a party to that relationship, the hearing examiner determined the Borough was obligated to maintain and guarantee the status quo during the contract hiatus because health insurance is a mandatory subject of bargaining.

What Am I Doing? Nothing.

Just Crushing It

A materials handler employed by Temple University Hospital was observed, outside of his assigned work area, socializing and playing video games during scheduled work hours. At the time of the infraction he had already received a final written warning under the employer's Corrective Action Discipline Policy, which also provided for immediate discharge for serious infractions such as “significant unprofessional conduct and or gross neglect of duties,” as defined under the hospital's Administrative Policies and Procedures set forth in the employee handbook.

Consistent with the employer's discipline policy and the handler's disciplinary history, the hospital discharged him.

Just Crushing It

A local Unemployment Compensation Service Center determined the handler was ineligible for benefits under Section 402(e) of the Unemployment Compensation Law because he engaged in willful misconduct. A Referee subsequently affirmed the denial of benefits and the Unemployment Compensation Board of Review affirmed the Referee's determination, prompting the instant appeal.

After reviewing the matter, the Pennsylvania Commonwealth Court, in an unreported majority decision, affirmed the finding of the Unemployment Compensation Board Review that the employer satisfied its burden of demonstrating the claimant's actions were inconsistent with the employer's best interest and “contrary to the type of behavior an employer has the right to expect of an employee.”

Just Crushing It

The appellate court explained that the claimant's undisputed presence outside of his assigned work area, socializing and playing video games during scheduled work hours, coupled with his disciplinary history, which included a final written warning, supported a finding that his actions constituted willful misconduct which rendered him ineligible for unemployment compensation benefits.

The court majority similarly rejected the claimant's alternative claim, that the hospital did not equally enforce its policy, noting the employer provided credible witness testimony that any differences in disciplinary action for similar violations were attributable to employees being in different stages of their individual progressive disciplinary process.

What are you doing???

What are you doing???

Is workers compensation available for an employee whose injuries are cause by his intentional, high-risk conduct? Maybe!

In Wilgro Services, Inc. v. WCAB, 165 A.3d 99 (Pa. Cmwlth. 2017), the Claimant was employed as an HVAC mechanic and was assigned to work on the roof of a customer's two story building. Instead of using his own ladder, he got on the roof using the ladder of roofers who were also working on the roof. The roofers and their ladder were gone by the time the Claimant finished his work. Although Claimant had a cell phone, he did not call the building owner, his employer, or any emergency number. He did not wait for someone else to come to assist him, even though he admitted that the odds were that someone else would come to the building. Instead, he decided to jump off of the roof. The Claimant suffered injuries to his feet and lower back as a consequence of his intentional, high risk conduct. He became disabled from working as a result of his injuries.

Because I Said So

The Claimant sought workers compensation. The WCJ awarded WC benefits, finding that the employer did not have an established proper protocol for employees that are stuck on a roof, and that, while Claimant's actions were "misguided," he suffered the work injury while in the course and scope of his employment. WCAB affirmed.

The Commonwealth Court affirmed. The Court found that while jumping off the roof was not one of Claimant's job duties, exiting a work site is a necessary component of any job, so Claimant was advancing his Employer's affairs. Claimant "was not engaged in horseplay but was merely trying to get off of the roof at the end of his work day."

"While Claimant's decision to jump was not advisable, may not have been a smart move, and may have been misguided, we cannot say that it was so unreasonable as to make the action so foreign to and removed from Claimant's job as to constitute an abandonment of that job." Wilgro Services, Inc., 165 A.3d at 106.

One Pill Makes You Bigger And One Pill Makes You Small

Just Say No?

A school bus driver became concerned that an increased dosage of Adderall medication, prescribed for her son's attention deficit hyperactivity disorder, was the cause of his loss of appetite. She wanted to experience first-hand any effects of the drug, and ingested a dose of the medication before reporting for her morning route. Upper Merion Area School District v. Teamesters Local #384, 165 A.3d 56 (Pa. Cmwlth. 2017).

After completing her route, a supervisor directed the driver to report for one of several random drug tests conducted throughout the year for safety sensitive personnel. The driver drove the bus to the testing site. Two days later a test-site physician notified the driver and the district of the driver's positive test for amphetamines.

In accordance with the terms of the parties' collective bargaining agreement, the district immediately suspended the driver without pay, and eventually terminated her employment for violating the district's drug policy.

Just Say No?

An arbitrator later partially sustained a grievance in the matter and ordered the driver's reinstatement, subject to strict drug-testing requirements. Although the arbitrator found the district had just cause to terminate the driver, the arbitrator determined the award drew its essence from the CBA because the district's reservation of discretion to impose a lesser penalty reflected an understanding that unique circumstances may warrant different handling of a violation.

On appeal a majority of the Commonwealth Court affirmed the lower court's decision. Relying on another court decision, Blairsville-Saltsburg School District, 102 A.3d 1049 (Pa. Cmwlth. 2014), the court majority determined the order of reinstatement, did not violate the established public policy of protecting children from illegal drug use. The appellate court explained that the grievant's experimental onetime use of the Adderall medication to test its effects, was a "single misadventure not likely to be repeated." Moreover, the appellate court determined the drug-testing conditions imposed on the grievant's reinstatement demonstrated the reinstatement did not "pose an unacceptable risk" that would undermine public policy.

New Labor Laws That May Be Coming

Predictive Scheduling

Predictive scheduling continues to catch on, with several jurisdictions enacting such laws. In Massachusetts, a new bill was introduced in September (SD 2331).

This measure would require employers to post a written notice of the seven-day schedule in a conspicuous location for each employee, at least seven days prior to the first day of that work schedule.

Under the bill, employers that change the schedule so as to reduce or eliminate hours must compensate affected employees with "predictability pay," the amount of which depends on the type of change to the schedule and the advance notice given.

NB: Not Yet Pennsylvania Law.

Salary History

A California bill, AB 168, limits an employer's ability to ask about or rely on an applicant's salary history when making employment decisions. It further requires employers to provide, upon request, a position's pay scale information.

Another salary history bill was introduced on the opposite coast, in Westchester County, New York. The Westchester measure is fairly broad and prevents employers from relying on salary history information in setting wages, unless the information is voluntarily offered by a candidate "to support a wage higher than the wage offered by the employer." The ordinance also would prohibit a potential employer's request for such information from an applicant's current or prior employer, unless: (1) an offer has been made; (2) the candidate discloses prior wages to support a wage higher than the wage offered; (3) the candidate authorizes, in writing, the potential employer's inquiry; and (4) the employer uses the information only to confirm the amount of prior wages.

NB: Not Yet Pennsylvania Law.

Paid Sick Leave

With many companies abandoning vacation and sick time policies in favor of one consolidated Paid Time Off (PTO) policy, employees are much less inclined to take off of work when they are sick. Instead, employees try to save as much of their PTO as possible for much-needed vacations. This trend has negative implications for the workplace, as it is becoming increasingly common for employees to come to work when sick and spread their germs around the office. As a result, the elimination of paid sick time could lead to decreased workforce productivity, safety, and morale.

In order to encourage employees to take care of their own health—and that of their coworkers—many cities and states are enacting their own paid sick leave laws. As one of the early adopters of this type of law, the State of California passed the Healthy Workplaces, Healthy Families Act (HWHFA) in 2014. The HWHFA requires employers to provide employees with one hour of paid sick leave for every 30 hours that they work. The federal government has adopted a similar policy by requiring contractors covered by Executive Order 13658 to offer paid sick leave for workers involved in new contracts beginning on or after January 1, 2017.

NB: Not Yet Pennsylvania Law.

Thank you!