# CURRENT ISSUES IN EMPLOYMENT LAW: EVERYTHING BEGINS WITH AN IDEA


ALLISON A. JONES

DOWNER, JONES, MARINO & WILHITE

401 MARKET STREET, STE. 1250

SHREVEPORT, LA 71101

POPE MALLETTE

MAYOMALLETTE, PLLC

2094 OLD TAYLOR ROAD, #200

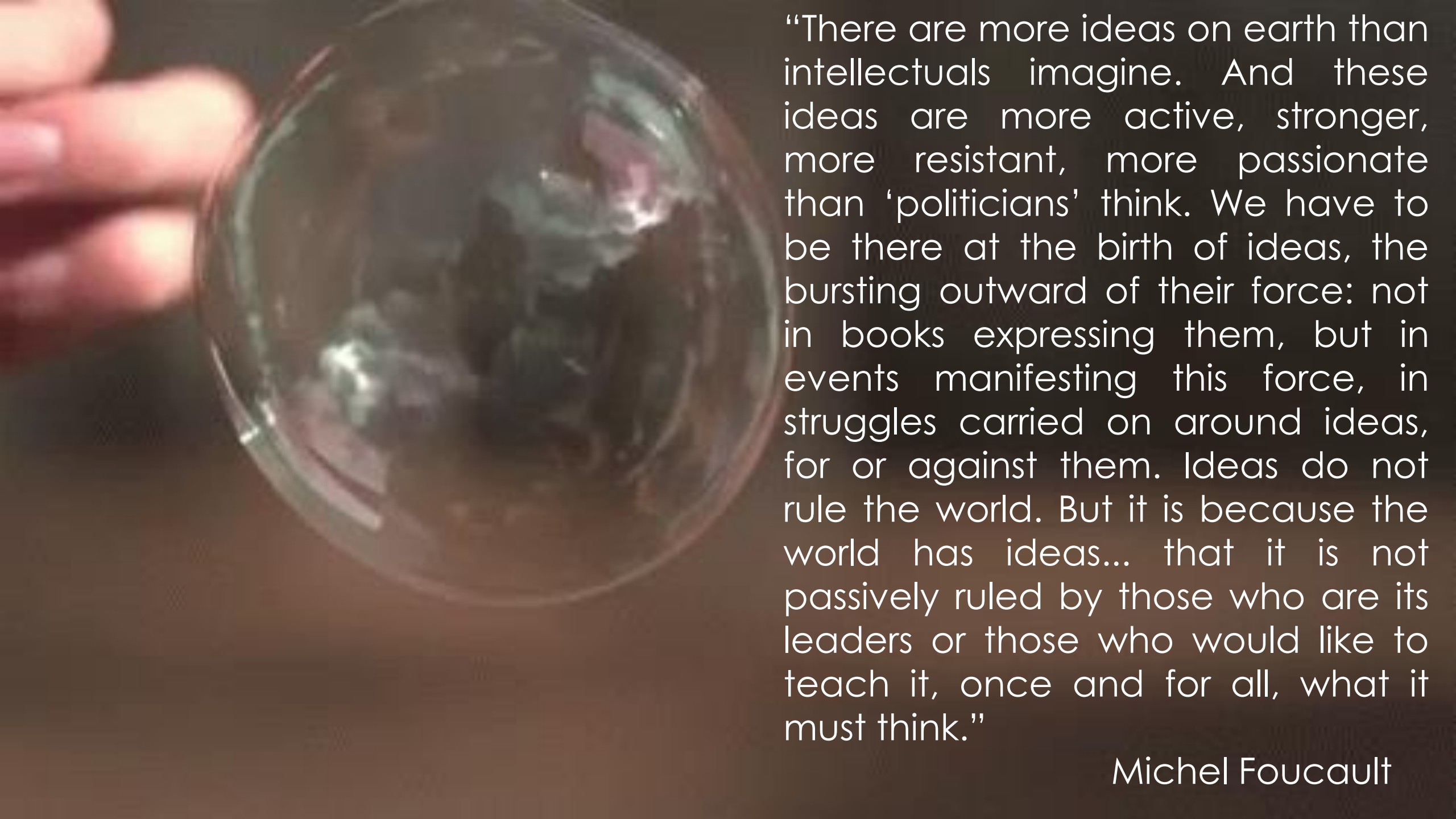
OXFORD, MS 38655

for good reason, bad reason, or no reason at all.


# IS THE EMPLOYMENT AT WILL DOCTRINE A MYTH?

| Law | Brief Description | Employer |
|---|---|---|
| Title VII of the Civil Rights Act of 1964 | Prohibits discrimination in the hiring process (race, color, religion, sex, national origin) | 15 or more employees |
| Americans with Disabilities Act (ADA) | Prohibits discrimination against a person with a qualified disability | 15 or more employees |
| Age Discrimination in Employment Act (ADEA) | Prohibits discrimination against workers aged 40 or older | 20 or more employees |
| Fair Labor Standards Act (FLSA) | Governs the following: duration of work hours, breaks, minimum salary, and overtime | Employer with $500,000 or more in gross annual sales or individual employee engaged in commerce |
| Family and Medical Leave Act (FMLA) | Employers must allow employees (who have worked there more than 12 months) up to 12 weeks off for certain medical conditions | 50 or more employees within a 75 mile radius |

# EXCEPTIONS TO BE DISCUSSED TODAY



“There are more ideas on earth than intellectuals imagine. And these ideas are more active, stronger, more resistant, more passionate than ‘politicians’ think. We have to be there at the birth of ideas, the bursting outward of their force: not in books expressing them, but in events manifesting this force, in struggles carried on around ideas, for or against them. Ideas do not rule the world. But it is because the world has ideas... that it is not passively ruled by those who are its leaders or those who would like to teach it, once and for all, what it must think.”

Michel Foucault

# #MeToo And #TIME'S UP



#MeToo

"I think it's about time.
For so long, women were silent."

# Overview of Existing Law

- Title VII of the Civil Rights Act of 1964 (Title VII) (makes it illegal to discriminate against someone on the basis of gender or sex)
- The Pregnancy Discrimination Act (PDA) (makes it illegal to discriminate against a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth)
- The Equal Pay Act of 1963 (EPA) (makes it illegal to pay different wages to men and women if they perform equal work in the same workplace)
- The Louisiana Employment Discrimination Law (La. R.S. 23:301 et seq.)
- Public policy exception to employment-at-will, following McArn v. Allied Bruce Terminix Co., 626 So. 2d 603 (Miss. 1993) and its progeny: Employer may not discharge employee for refusing to participate in an illegal act, or for reporting an employer's illegal act to the employer or to a third party
- Texas: Chapter 21 of the Texas Labor Code

# An Overview – Harassment

**Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.**

- **The U.S. Equal Employment Opportunity Commission**

# An Overview – Harassment

## Quid Pro Quo

- When some type of employment benefit (or the avoidance of adverse employment action) is made contingent on participating in sexual activity

## Hostile Work Environment

- When unwelcome sexual conduct unreasonably interferes with the employee's work performance or creates an intimidating, hostile, or offensive working environment

Distinction less pronounced now, with overarching question whether the conduct changes the terms of the affected employee's employment

# Elements of Sexual Harassment Claim

- Member of Protected Class;
- Subjected to Unwelcome Harassment;
- Because of  the Claimant's Sex;
- Harassment was severe or pervasive enough to affect a term or condition of employment

# Faragher/Ellerth Holding and Affirmative Defense

- ***Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Burlington Indus., Inc. v. Ellerth*, 524 U.S. 765 (1998).**
- **The Supreme Court ruled that when a supervisor's sexual harassment culminates in a tangible employment action, such as dismissal or an undesirable reassignment, the employer is automatically liable. However, when no tangible employment action is taken, the employer may avail itself of an affirmative defense.**
- **The defense has two necessary elements:**
  - **that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and**
  - **that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.**

# Foreshadowing of the Movement

***Royal v. CCC & R Tres Arboles, L.L.C.,***

**736 F.3d 396, 400 (5th Cir. 2013)—one of the cases signaling rejection of the notion that "boys will be boys!"**

**See also *Consolidated Communications, Inc. v. NLRB*, 837 F.3d 1, 24 (D.C. Cir. 2016) ("It is 2016, and "boys will be boys" should be just as forbidden on the picket line as it is on the assembly line.")**

# It Ignited With an Idea that Found Its Way In a Tweet

- Historically “me too” evidence had been viewed negatively by the courts
- Tarana Burke, an American social activist, began using the phrase “Me Too” as early as 2006, and the phrase was later popularized by American actress Alyssa Mylano, on Twitter on October 15, 2017. With the hashtag #METOO, Milano encouraged victims of sexual harassment to tweet about it and “give people a sense of the magnitude of the problem.”
- 200,000 tweeted the hashtag by the end of the day and 500,000 tweeted by October 16. A total of 4.7 million people in 12 million people during the first 24 hours on Facebook.

# The Mighty Have Fallen

- At least 414 high-profile executives and employees across fields and industries have been outed by the #MeToo Movement in 18 months, according to data collected by a New York-based crisis consulting firm.
- Among the 414 people accused, 190 were fired or left their jobs. Another 122 have been put on leave, suspended or are facing investigations since December 2016. For about 69 people, there were no repercussions. In recent months, the rate of accusations has been slowing but the percentage of people being fired has increased.
- Only eight of the people were said to be involved in consensual relationships.
- Out of the 414 people accused, all but seven are men. Much of the behavior is related to incidents that may have happened a long time ago but surfaced now as tolerance has dropped and it has become more newsworthy.
- Source: #MeToo Has Implicated 414 High-Profile Executives and Employees in 18 Months, Time Magazine, June 25, 2018

# The Statistics

- Overall, there has been a 10% decrease in employment discrimination charges filed in 2018.
- However, the EEOC reported a 13.6 increase in sexual harassment charges. See, EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data https://www.eeoc.gov/eeoc/newroom/release/4-10-19
- Additionally, the number of sexual harassment charges among federal employees increased by 100 from 2016 to 2017 and then again in from 2017 to 2018. See, Louis C. LaBrecque, #MeToo Fed: Sexual Harassment Claims Up to 205 a year, Tip of the Iceberg, Daily Lab. Rep. (Bloomberg Law May 15, 2019).

# Federal Action Affecting Sexual Harassment Claims

**On December 22, 2017, President Trump signed the Tax Cuts and Jobs Act, which contained a salute to the "Me Too" movement. A desire to promote transparency in sexual harassment cases is likely the impetus for Section 13307 of the bill, titled "Denial Agreements Paid in Connection with Sexual Harassment or Sexual Abuse." The provisions amended section 162 of the tax code, which generally allows business to deduct certain ordinary and necessary expenses paid or incurred during the year as part of running the business.**

**Additional legislation is currently sitting in the Ways and Means Committee (HR 4495)**

**COULD THIS BACKFIRE?**

# Non-Disclosure Agreements? Several States Have Passed Laws Prohibiting Them

- Things are about to change for parties settling sexual harassment claims in VARIOUS STATES
- In 2018, the New York State $168 billion state budget measure added several anti-sexual harassment protections, including a limit on the use of nondisclosure agreements. In the age of #MeToo, the newly implemented state law places the right of disclosure firmly in the hands of the individual who raises a complaint.
- The impact of the nondisclosure clause won't just change settlements in sexual harassment claims. It will impact pretty much all separation agreements. CONSIDER: "Everyone's boilerplate agreements will have to change."
- New York's action follows on the heels of anti-harassment legislation being passed across the nation—from Washington, where Gov. Jay Inslee (D) recently signed into law a bill that bars contract provisions preventing employees from discussing workplace harassment or sexual assault, to Arizona, where Gov. Doug Ducey (R) will soon be presented a bill barring NDAs for public officials who use state cash to settle sexual misconduct complaints.
- Louisiana is On Board: Act No. 35, enacting La. R.S. 13:5109.01, prohibits non-disclosure agreements in sexual harassment and sexual assault settlement agreements of claims against the state, a state agency, a political subdivision or any employee or office of the state, a state agency or political subdivision.
- No such provision in Mississippi.

# The Possible Effect of the #MeToo Movement on *Faragher/Ellerth* Affirmative Defense

- **Minarsky v. Susquehanna County, 895 F.3d 202 (3d Cir. 2018)**
- **In footnote 12, the court stated as follows:**
  - **"This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that had been closeted for years, nor reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all instances, the victims asserted a plausible fear of adverse consequences had they spoke up at the time the conduct occurred."**
- **The Court, thus, concluded that juries may find non-reporting to be both understandable and reasonable.**
- **This may mean less summary judgments and more trials**
- **See, What Employers Should Know About the Third Circuit's Take on Faragher/Ellerth (July 10, 2018)**
- **https://ogletree.com/insights/2018-07-10/reexamining-reasonableness-what-employers-should-know-about-the-third-circuits-take-on-the-faragher-ellerth-defense/**

# Expanding Retaliation Claims

- The Movement MAY Change the Standard for Retaliation Cases
- Under Fifth Circuit precedent, "a plaintiff can establish a prima facie case of retaliatory discharge . . . if he shows that he had a reasonable belief that the employer was engaged in unlawful employment practices." *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130, 1140 (5th Cir. 1981).
  - We do observe, however, that our precedent is in tension with the plain text of the statute, which appears to require that the employer's practice actually be unlawful under Title VII. See 42 U.S.C. § 2000e-3(a) (defining unlawful retaliation as "discriminating against any individual . . . because he opposed any practice made an unlawful employment practice by [Title VII] . . . ."). This tension, somewhat unexplained in other circuits as well, has not yet been resolved by the Supreme Court. *See Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (declining to rule on whether the opposition requirement for a retaliation claim can be satisfied with a "reasonable belief" that conduct violates Title VII); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 187 (2005) (Thomas, J., dissenting) ("Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim").
- *EEOC v. Rite Way Service, Inc.*, 819 F.3d 235, 239 (5th Cir. 2016)

# The Possible Effect of the #MeToo Movement on Retaliation Claims

**"Here, too, the #MeToo movement may have another impact. To the extent there is a growing awareness and recognition of the harms of sex based harassment, courts may be more willing to find a victim's belief that an unwanted touching or suggestive comments violated the law to be reasonable, even if the conduct itself does not meet the standard."**

**Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 Emory L.J. Online 1014 (2018).**

# Equal Pay Is The Issue! Sexual Harassment is Just a Symptom

# Why, What, When?

***Rizo v. Yovino*, 887 F.3d 453 (9th Cir. Apr. 9, 2018) (en banc)**
**Vacated on other grounds, Yovino v. Rizo 139 S.Ct. 706 (2019)**

# Equal Pay


- Obviously, the equal pay battle didn't begin around the World Cup, but it was heightened by the event.
- The U.S. women have been fighting for equality for some time. In 2016, five high-profile members of the USWNT -- Carli Lloyd, Hope Solo, Alex Morgan, Rapinoe and Becky Sauerbrunn -- filed a complaint against the United States Soccer Federation (commonly referred to as U.S. Soccer) with the Equal Employment Opportunity Commission.
- The EEOC never issued a decision on the case, and in the meantime, the women signed a new collective bargaining agreement with the USSF.
- In August 2018, Solo filed her own case against U.S. Soccer -- with similar complaints -- in a personal lawsuit, which remains pending in California.

# Equal Pay

- Currently 28 team members are named plaintiffs in the case filed in United States District Court in Los Angeles, and they are seeking class-action status over "institutionalized gender discrimination" toward the team. The lawsuit was filed under the Equal Pay Act and Title VII of the Civil Rights Act.
- The plaintiffs are seeking equitable pay and treatment, in addition to damages including back pay. Among complaints about wages, the lawsuit also notes issues with where and how often the women's team played, medical treatment and coaching. The class-action request would allow any players for the team since February 2015 to join the case.
- The lawsuit claims that from March 2013 through Dec. 31, 2016, when the previous collective bargaining agreement expired, players on the women's team could make a maximum salary of $72,000, plus bonuses for winning non-tournament games as well as World Cup appearances and victories, and for Olympic placement.
- A comparison of the WNT and MNT pay shows that if each team played 20 friendlies in a year and each team won all 20 friendlies, female WNT players would earn a maximum of $99,000 or $4,950 per game, while similarly situated male MNT players would earn an average of $263,320 or $13,166 per game against the various levels of competition they would face.
- The lawsuit further cites the women's three World Cup titles, four Olympic gold medals and the 2015 World Cup title game being the most-watched soccer match in American television history. The USWNT has also been ranked No. 1 in the world for 10 of the past 11 years.
- The lawsuit also references the "revenue-sharing model" the U.S. Women's National Team Players Association (USWNTPA) pitched as part of a new collective bargaining agreement, which took effect on Jan. 1, 2017, and runs through 2021.
- At the time, the pitch was meant to challenge U.S. Soccer's assessment that "market realities do not justify equal pay." The Complaint states: "Under this model, player compensation would increase in years in which the USSF derived more revenue from WNT activities and player compensation would be less if revenue from those activities decreased. This showed the players' willingness to share in the risk and reward of the economic success of the WNT."

# Pay Expansion on State Level

**"Massachusetts, Oregon, Washington, and New Jersey will soon have in place some of the most comprehensive state equal pay laws in the country. The legislation parallels the growing national focus on gender inequality in the workplace, whether it's sexual harassment, glass ceilings, or pay disparity." Jacquie Lee, *Some Predict More State-Court Class Actions in Pay Bias Cases*, Daily Lab. Rep. (BNA) (Apr. 26, 2018).**

**LOUISIANA HAS ONLY DONE THIS FOR PUBLIC EMPLOYEES**

# Pay Expansion

- Paycheck Fairness Act, H.R. 7, 116th Congress (2019 -2020), reintroduced
- www.congress.gov/bill/116th-congress-bill/7/text

# EXPANSION OF THE TERM "BECAUSE OF SEX" – SEXUAL ORIENTATION

# Ever Expanding

- LGBTQ

# Because of Sex

# Ever Expanding

- **LGBTQ**
  - **EEOC: "a claim of discrimination on the basis of sexual orientation "necessarily states a claim of discrimination on the basis of sex"**
  - **EEOC for 40 years held that Title VII did not cover the LGBTQ community**
  - **Then, recently in *Baldwin v. Foxx*, it reversed its position. EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015)**

# Justification

- Sexual orientation discrimination involves sex stereotyping in not conforming to gender norms
- Discrimination amounts to gender-based associational-type discrimination
- Sexual orientation requires consideration of a person's sex


# Sexual Orientation

- Sexual Orientation Discrimination - *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2016) (en banc).
- 7th Circuit became first circuit in nation to hold that "because of . . . sex" in Title VII includes sexual orientation.
- Follows from EEOC decision in *Baldwin v. Foxx* in 2015.

# Sexual Orientation

- ***Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc).**
- **Relying on *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), for statutory interpretation of the text of the statute, the court reasoned that "because sexual orientation is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it."**
- **"[S]exual orientation discrimination is an actionable subset of sex discrimination."**

# Sexual Orientation

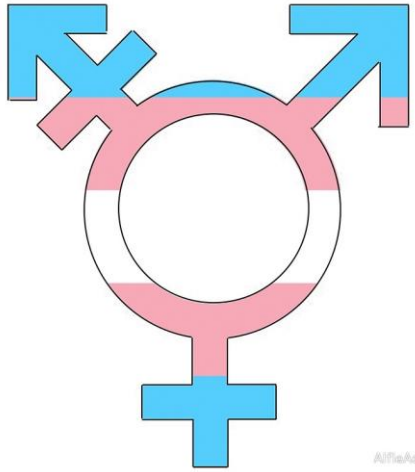
- *Franchina v. City of Providence*, 881 F.3d 32 (1st Cir. 2018).
- City firefighter alleged sex-based harassment. She was a lesbian, and much of the harassment invoked her sexual orientation.
- The First Circuit panel held that plaintiff's claim was actionable under a sex-plus theory in which the plus characteristic is her sexual orientation. In such a claim the plaintiff must prove that the employer took an adverse employment action *at least in part* because of the employee's sex.
- In a footnote, the court cited *Hively v. Ivy Tech* as support for the proposition that "the tide may be turning" for Title VII's protections.

# Other Circuits Have Said, "No"

- ***Gerald Lynn Bostock v. Clayton County*, No. 17-13801, 723 Fed. Appx. 964 (11th Cir. 2018)**
- ***Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019)**
- ***O'Daniel v. Indus. Serv. Sols.*, 2019 U.S. App. LEXIS 11458 (5th Cir. 2019)**

# Transgender Rights

- *EEOC v. R.G. & G.R. Harris Funeral Homes*, 884 F.3d 560 (6th Cir. 2018).



# Sexual Orientation: Because Of Sex

- On April 22, 2019, the Supreme Court granted certiorari in three cases relating to Title VII's coverage (or noncoverage) of workplace discrimination based on sexual orientation and/or transgender status. Those cases are Gerald Lynn Bostock v. Clayton County, supra, *Altitude Express, Inc. v. Zarda., supra,* and *R.G. & G.R. Harris Funeral Homes v. EEOC, supra*.
- The Court consolidated *Bostock* and *Zarda*, which both concern whether discrimination against an individual because of his or her sexual orientation is discrimination "because of . . . sex" as prohibited by Title VII.
- In *R.G. & G.R. Harris Funeral Homes*, the Supreme Court will decide whether Title VII prohibits discrimination against transgender individuals based on (1) their status as transgender or (2) sex stereotyping theory under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

# LGBTQ Case: Sexual Orientation

Altitude Express, Inc. v. Zarda, 139 S. Ct. 1599 (2019)

SCOTUS Blog: https://www.scotusblog.com/case-files/cases/altitude-express-inc-v-zarda/

2nd Circuit Opinion

Cert. Granted: Apr 22 2019

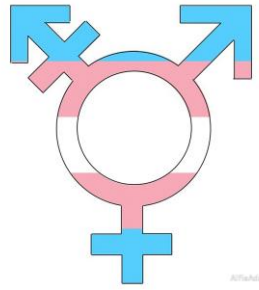
# ENDA

Introduced in the Congress many years ago

Tries to include LGBTQ in Title VII, but has never passed

# But Consider: ADAAA

- ***Blatt v. Cabela's Retail, Inc.*** **2107 WL 2178123 (E.D. Pa. May 18, 2017), held that the exclusion in 42 U.S.C. Section 12211(b)(1), preventing ADA protection for "gender identity disorders" refers to "the condition of identifying with a different gender," but it does NOT exclude from ADA coverage those "condition that persons who identify with gender dysphoria, which substantially limited her major activities of interacting with others, reproducing, and social and occupational functioning."**
- **Obviously, the case law is developing**



# LEGAL LIABILITY IS DEPENDENT UPON EMPLOYER/EMPLOYEE RELATIONSHIP

# Employee – Independent Contractor and Joint Employer

- Issues of employer-independent contractor and joint employers
- Department of Labor Opinion Letter dated April 29, 2019
  - www.dol.gov/whd/opinion/FLSA/2019/2019-04-29-06-FLSA.pdf (virtual marketplace company that operates the so called on demand or sharing economy are "independent contractors" Applied the six factor "economic realities test."
- NLRB is at the eye of this storm. See, Advice Memorandum, Uber Technologies, Inc. (April 16, 2019) ("applying the 'common law' agency test…we conclude that drivers are independent contractors").
- Courts are contributing:
  - *Razak v. Uber Techs, Inc, 2018 U.S. Dist. LEXIS 61230* (E.D. Pa. April 11, 2018).
- *Hy-Brand Indus. Contractors, Ltd.*, 365 NLRB No. 156 (2017) overturned *Browning-Ferris Industries of Calif.*, 362 NLRB No. 186 (2015). BUT NLRB VACACTED *HY-BRAND* BECAUSE OF BOARD MEMBER WILLIAM EMMANUEL'S PARTICIPATION IN THE DECISION
- 4th Circuit case under *FLSA—Hall v. DIRECTV, LLC*, 846 F.3d 757 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 635 (Jan. 2018)

# Employee – Independent Contractor and Joint Employer

- In September, 2019, California Assembly Bill 5 was approved by the California State Senate 29-11 on a party-line vote, by the Assembly by 56-15, and signed by Governor Gavin Newsom. It will take effect January 1, 2020.
- This new law limits the companies' ability to continue classifying their drivers as independent contractors. Uber and Lyft will have to designate all drivers as employees, which requires them to comply with minimum wage laws and pay employer-based taxes, among other measures.
- New York already has a similar law enacted.

# Who Is An Employee in the Age of the "Gig Economy?" Independent Contractor

**U.S. Magistrate Judge held that a Grubhub driver was an independent contractor rather than an employee in *Lawson v. Grubhub, Inc.*, No. 15-cv-05128-JSC, 2018 WL 776354 (N.D. Cal. Feb. 8, 2018). The court applied the California *Borello* test. The court bemoaned that the determination of status is an all-or-nothing test—a worker is an employee and gets all the protections afforded by law or is an independent contractor and gets none. The court observed that, with the advent of the "gig economy," the legislature may want to address "this stark dichotomy."**

**The California Supreme Court decreased the role of the *Borello* test in *Dynamex Operations West v. Superior Court*, No. S222732, 2018 WL 1999120 (Cal. Apr. 30, 2018) (adopting the "ABC test" for state law wage and hour cases).**

# FIFTH CIRCUIT CASE

- *Parrish v. Premier Directional Drilling, L.P.*, No. 17-51089, 917 F.3d 369, 2019 U.S. App. LEXIS 6115, 2019 WL 973091

# Joint Employer

## The Department of Labor and the NLRB Have Recently Proposed Rules

# DOL Proposed Rule

- Narrows the circumstances under which a business can be considered a joint employer under the FLSA
- 84 Fed. Reg. 14043 (April 9, 2019)
- The rule considers four factors collectively
  - Hire or fire of the employee
  - Supervise and control of employee's work schedules or conditions of employment
  - Determine the employee's rate and method of payment; and
  - Maintain the employee's employment records
  - Text to be at 29 C.F.R. Section 791.2(a)(2)

# NLRB Proposed Rule

- NLRB Proposed Rule: Fed. Reg 2018-19930329 (Sept 14, 2018) would be at 29 C.F.R. Section 103.40
  - "An employer, as defined by Section 2(2) of the National Labor Relations Act may be considered a joint employer of separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction. A putative joint employer must possess and actually exercise substantial direct and immediate control over the employees' essential terms and conditions of employment in a manner that is not limited and routine.
  - Comment Period has closed, but work on the rule is still continuing
  - Background: Browning v. Ferris, 362 N.L.R.B. No. 186 (2015) v. Hy-Brand Industries Contractors, Ltd, 365 N.L.R.B. No 156 (2017)

# Who Is an Employee?

- **In an action seeking minimum wage and overtime payments under the FLSA and state law claims, a U.S. District Court, applying the multi-factor economic realities test, held that Uber drivers are independent contractors, not employees. *Razak v. Uber Techs., Inc.*, No. 16-537, 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018), appeal filed, No. 18-1944 (3d Cir. Apr. 27, 2018).**

# Big Law – Partner? Employee?

**Knepper v. Ogletree, Deakins, Nash, Smoak & Stewart, P.C., N.D. Cal., No. 3:18-cv-00303, class complaint filed 1/12/18, See also *Doe v. Proskauer Rose LLP*, United States District Court District of Columbia, Civil Action No: 1:17-cv-00901.**

68. Earlier in her tenure, Partner 3 encouraged Jane Doe 2 and other attorneys in the practice group to "wine and dine" a young male associate, a practice usually reserved for more senior attorneys. Once the male associate was hired, Partner 3 began working primarily with him.

69. Partner 3 prefers to work with male attorneys. This preference has had a discriminatory impact on the women in Jane Doe 2's practice group, who have had fewer opportunities for substantive work, client contact, and business development opportunities. As an example, male associates in the practice group have been flown to New York to meet and work with prominent partners and clients; MoFo has not offered the same experience to female associates in the group, even those more senior than the male associates in question.

# THE ARBITRATION REACTION

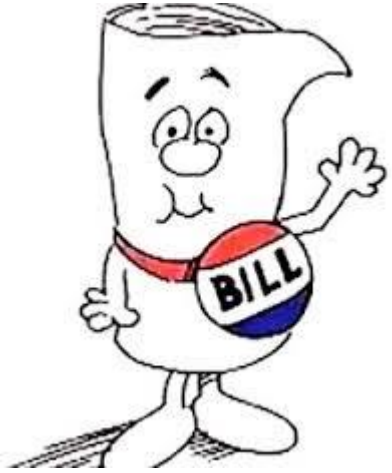
# Supreme Court Sides with Employers in Class Action Arbitration Cases

**Epic Systems Corp. v. Lewis, No. 16–285. Argued October 2, 2017—Decided May 21, 2018**

# Ending Forced Arbitration of Sexual Harassment Act

**H.R.4570 - Ending Forced Arbitration of Sexual Harassment Act115th Congress (2017-2018)**

**S.2203 - Ending Forced Arbitration of Sexual Harassment Act of 2017115th Congress (2017-2018)**



# Other Areas of The Law That Are Experiencing Expansion of Ideas

- The American With Disabilities Act of 1990, as amended in 2008
- Family Medical Leave Act

# ADAA and FMLA

# HAPPENINGS: AMERICANS WITH DISABIITIES ACT

## AREAS OF EXPANDED COVERAGE

# Transient/Temporary Disabling Condition

- *Summers v. Altarum Inst., Corp*, 740 F.3d 325 (4th Cir. 2014).
- *Mancini v. City of Providence by and through Lombardi,* 909 F.3d 325, n.1, 333 (4th Cir. 2014)
- *Gogos v. AMS Mechanical Systems, Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013)
- *Mullinex v. Eastman Chem. Co.*, 237 F. Supp.3d 695, 705 (E.D. Tenn. 2017)
- *Taylor v. FedEx Ground Package Sys., Inc.*, No. 3:16-CV-402, 2018 WL 1363063(JCH) (D. Conn. Feb. 26, 2018).
- *Valenzuela v. Bill Alexander Ford Lincoln Mercury Inc.*, CV-15-00665-PHX-DLR, 2017 WL 1326130 (D. Ariz. Apr. 11, 2017).

# EPISODIC IMPAIRMENTS

- **IMPAIRMENT THAT IS EPISODIC OR IN REMISSION IS A DISABILITY IF IT WOULD SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY WHEN ACTIVE.**
- ***Hostettler v. Coll of Wooster*, 895 F.3d 844, 854 (6th Cir. 2018)**
- ***Cf. Trautman v. Time Warner Cable Texas, LLC*, 2017 WL 5985573 (W.D. Tex. Dec. 1, 2017)**

# Relational or Associational Discrimination Under the ADA

- **(1) the plaintiff was "qualified" for the job at the time of the adverse employment action;**
- **(2) the plaintiff was subjected to adverse employment action;**
- **(3) the plaintiff was known by his employer at the time to have a relative or associate with a disability;**
- **(4) the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision.**
- ***Hartman v. Lafourche Parish Hosp.*, 262 F. Supp. 3d 391, 398 (E.D. La. 2017).**

# Accommodations: New Millenial Work Force With Generation Z Coming Soon

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- ***Credeur v. Louisiana, through Office of Attorney General*, 860 F.3d 785 (5th Cir. 2017).**
- **Telecommuting for unlimited period of time is not reasonable accommodation when employer defines regular office attendance as an essential function of the job. Regulation lists 7 considerations in determining essential functions, and greatest weight is accorded to employer's judgment.**
- **Plaintiff's claim failed because she could not establish that she was a "qualified individual with a disability."**

# Remember: Still Must Be an Employee And in Gig Economy This Is Real Issue: Department Of Labor Opinion Letter April 29, 2019



- In Opinion Letter FLSA2019-6, issued on April 29, 2019, U.S. Department of Labor (DOL) has weighed in on the status of gig economy workers under the Fair Labor Standards Act (FLSA). The DOL concluded that the workers reviewed in the letter are independent contractors. This opinion may have a wide effect in jurisdictions that apply the FLSA in making determinations regarding independent contractor classifications and could portend a trend in some areas to extend independent contractor classifications.
- The DOL concluded that the company "empowers service providers to provide services to end-market consumers" and merely provides a referral service. According to the DOL, "as a matter of economic reality, they are working for the consumer," not the company providing the platform.

# HAPPENINGS: FMLA

# DOL March 14, 2019 Opinion Letter

- On March 14, 2019, the DOL issued an opinion letter which raises some issues under the FMLA. Specifically, the DOL opined that an employer "may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation." This seems to be at odds with 29 C.F.R. § 825.207, which states that the "FMLA permits an eligible employee to substitute accrued paid leave for FMLA leave."
- The DOL attempts to address this apparent inconsistency by explaining in a footnote that "substitute" means that the paid leave runs concurrent with the FMLA leave. If that is correct, it would benefit employers by automatically prevent stacking of leave. However, it takes away the employee's choice.
- What is more troubling for employers is that the opinion letter goes on to state that an employer may also not designate more than 12 weeks of leave as FMLA leave. The EEOC has made it clear that some definitive extension beyond the 12 weeks required by the FMLA may be required as a reasonable accommodation under the ADA. If an employer extends the FMLA leave as part of its duty of reasonable accommodation, is the employer only allowed to count the first 12 for purposes of future leave under the rolling 12-month method?

# WHAT HAPPENS WHEN ADA CLASHES WITH FMLA?

# Leave As An Accommodation

- **Remember that disability is no longer difficult to prove – broadly interpreted.**
- **What does this have to do with employee leave? Leave may be a reasonable accommodation. Even leave in excess of what is required under the FMLA.**

# POST 2008: FMLA V. ADA

# Differences Between FMLA and ADA

- **FMLA: provides NO RECOGNITION of any hardship experienced by the employer from the exercise of FMLA leave.**
- **ADA: recognizes concept of "undue hardship as defense to a claim of failure to "accommodate a qualified individual with a disability."**
- **There is no such defense in the FMLA, and it requires employers to comply with its obligations and protections just as they must comply with minimum wage statutes.**
- **FMLA definition of "employer" (50 or more employees) differs from the definition used by the ADA (15 or more employees).**

# DIFFERENCE BETWEEN FMLA AND ADAAA CONTINUED

- The ADA does not impose the same eligibility requirements
  - A qualified employee may be entitled to leave as a reasonable accommodation even if
    - The employer has less than fifty – but at least fifteen – employees
    - The employee has not worked at the company for twelve months
    - The employee has not worked at the company for the requisite 1,250 hours
    - The employee has already exhausted twelve weeks of FMLA leave

# "Serious Health Condition" v. "Disability"

**A "serious health condition" entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:**

- **Inpatient care; or**
- **Continuing treatment by a health care provider, which requires absence for 3 full, consecutive calendar days of incapacity and a regimen of continuing treatment.**

**Under the ADA, the term disability" means, with respect to an individual:**

- **(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;**
- **(B) a record of such an impairment; or**
- **(C) being regarded as having such an impairment (as described in paragraph (3)).**

**BOTH ARE TO BE BROADLY INTERPRETED**

# Essential Functions of The Job

- An employee is unable to perform the functions of the position where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's job.
- "Essential functions" in the FMLA context means the same thing as it does under the ADAAA:
  - Whether employees in the position actually are required to perform the function, and whether removing that function would fundamentally change the job.
- It does not mean total incapacitation, and an employee is considered to be unable to perform essential functions of the job when he or she is absent to receive or in preparation to receive treatment.
- The employer should include along with its request for medical certification of a serious health condition a description of the essential functions of the job and a request that the health care provider render an opinion as to whether the employee can perform them. 29 C.F.R. § 825.123.

# Essential Functions of The Job

- This is one area in which the FMLA and the ADA create confusion.
- For example, an employer may seek to accommodate an employee under the ADA by relieving him of certain duties.
- However, the FMLA gives the employee the right to take leave rather than accept the accommodation.

# Qualified Employees, Direct Threats, and Shifting the Burden on Burden Shifting

- "An employer is entitled to a direct threat defense if an employee poses 'a significant risk to the health or safety of other that cannot be eliminated by reasonable accommodation.'" Nall v. BNSF Ry. Co., 912 F.3d 263, 270 (5th Cir. 2018) (*withdrawn*); see also Nall v. BNSF Ry. Co., 917 F.3d 335 (5th Cir. 2019).
- Who decides?
- "[T]he question here is whether the processes used in determining that Nall could not perform the essential duties of a trainman safely were objectively reasonable; or, applying the summary judgment standard, whether a reasonable jury could conclude that BNSF's actions were not objectively reasonable." *Id*.
- *But see*: "Just because an employee disagrees with an employment decision—and just because a plaintiff's expert disagrees with the underlying medical judgment that led to that employment decision—does not make the employment decision 'objectively unreasonable.' . . . Under the majority's approach, however, a plaintiff is entitled to take a case to trial so long as he can identify some procedural irregularity in the process used by him employer to determine whether or not he presents a direct threat." Id. (J. Ho, *dissenting*).
- *See also*: "In determining whether an education institution's eligibility requirement is essential and whether it has been met, the court must afford a measure of deference to the school's professional judgment." Class v. Towson, 806 F.3d 236, 245 (4th Cir. 2015); *Chiari v. City of League City*, 920 F.2d 311, 311 (5th Cir. 1991) ("Chiari maintains that, despite the testimony of the three physicians, a jury still could find that he is capable of performing his job without endangering others. He contends, and the City concedes, that he has never fallen on anyone or injured anyone in the past. The risk, he states, is not that he will hurt others but that he will hurt himself, and he argues that this court cannot consider the risk of personal injury to the handicapped individual as one of the factors in determining whether that individual is qualified to do a job. We disagree.").
- Whose burden?
- "We do not reach the question of which party bears the burden of proof regarding the direct threat defense." *Nall*, 917 F.3d at 343 n. 5.

# Interaction of FMLA and ADA

- ***Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1441 (2018).**
- **Whether employer violates ADA by refusing to grant long-term medical leave beyond what is required by FMLA.**
- **No. "The ADA is an anti-discrimination statute, not a medical leave entitlement."**

# The ADAAA: Leave As A Reasonable Accommodation

- **If an employee has a disability, an employer may be required to provide leave, even if the employee has exhausted FMLA leave.**
- **Is additional leave beyond the FMLA requirements always required by the ADA? No.**
- **Remember that indefinite leave is not a reasonable accommodation. The employee does not have to give a set return date, but must at least be able to give an estimate. The employee may also revise the return date. ("Reasonable accommodation does not require an employer to wait indefinitely for the employee's medical condition to be concluded" *Rogers v. Int'l Marine Terminals, Inc*. 87 F.3d 755 (5th Cir. 1996); *Reed v. Petroleum Helicopters Inc*., 218 F.3d 477,481 (5th Cir. 2000))**


# How to Determine if Leave is a Reasonable Accommodation Under the ADAAA?

- **First, determine if the employee has made a request for a reasonable accommodation. Has the employee expressed a desire to return to work? Has the employee stated that additional leave will allow him/her to return?**
- **Second, conduct the interactive process with the employee. The ADA requires the employer to sit down with the employee and to discuss the possible accommodations that would allow the employee to perform the essential functions of his or her job. Are there any options other than leave? The employer must document this process including any accommodations proposed by the employee and the employer.**

  > ***EEOC v. Chevron Phillips Chem. Co. LP* 570 F.3d 621 (5th Cir. 2009) "[w]hen an employer does not engage in a good faith interactive process, the employer violates the ADA – including when the employer discharges the employee instead of considering the requested accommodations. *Picard v. Tammany Parish Hospital*, 423 Fed. Appx 467m 470 (5th Cir. 2011), failure of employer to engage in interactive process is not a per se violation if there was no reasonable accommodation available.**

- **Third, require the employee's physician to provide employer with responsive and complete verification for the need for leave. Does the physician believe that leave will allow the employee to return?**

# How to Determine if Leave is a Reasonable Accommodation Under the ADAAA?

- **Fourth, choose a reasonable accommodation and communicate it to the employee. Remember that the employee is entitled to a reasonable accommodation, not any reasonable accommodation he/she chooses. Does the employee's physician believe that employer proposed accommodation will enable the employee to perform the job? Has the employer documented why employer believe the accommodation is reasonable or why one is preferable to the other?**
- **Fifth, if employer is considering denying the request for an accommodation, employer must first analyze whether the accommodation would cause an undue hardship. Ask how the company will be harmed if the accommodation is not granted. What concrete costs will there be? Are the costs hypothetical and uncertain or likely? It is always advisable to discuss the decision to deny an accommodation with counsel prior to communicating it with the employee.**

# HOPES:
# FAMILY MEDICAL LEAVE ACT

## PAID LEAVE IS IN THE FUTURE

# Contraception Coverage

- In the highly-publicized *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) decision, the Court held specifically that the Religious Freedom Restoration Act prevented the United States Department of Health and Human Services from requiring three closely held corporations to provide contraception coverage, where such coverage would violate the sincerely held religious beliefs of the companies' owners.
- The Court emphasized that its holding was "very specific" and it did *not* hold that other for-profit corporations and commercial enterprises could opt out of the Affordable Care Act contraception mandate.


- The upshot of this decision is that the ACA contraceptive mandate still applies to most private employers, absent a specific exception under the statute and regulations, unless the employer is a closely held corporation whose owners can provide evidence of their personal religious beliefs.

# The effects of HOBBY LOBBY?


- Before and after the decision there were two main concerns as to how this decision might affect employment rights and responsibilities:
  - Hobby Lobby only objected to 4 out of 20 FDA approved contraceptives. What would happen if a company objected to providing any contraception?
  - Does the victory enable corporations to disobey any civil right statutes by hiding behind religious objections?

# The effects of *HOBBY LOBBY*? Neither Concern HAS COME TO PASS

- The ruling was narrow. It did not take away any person's healthcare coverage. Nor did it take away any woman's access to any kind of contraception.
- Here, under the ACA the government would pick up the tab for the contraception under an ACA.
- The case, then, is an example of the application of a good balancing test.
- But it leaves several questions unanswered:
  - Will the ruling open the door to all kinds of discrimination?
  - What about LGBTQ groups who are not yet members of a protected class?
  - What happens if there is not a "least restrictive way" to further the compelling governmental interest?

**Burwell v. Hobby Lobby**

The court ruled that corporations controlled by religious families cannot be required to pay for contraception coverage for their female workers.

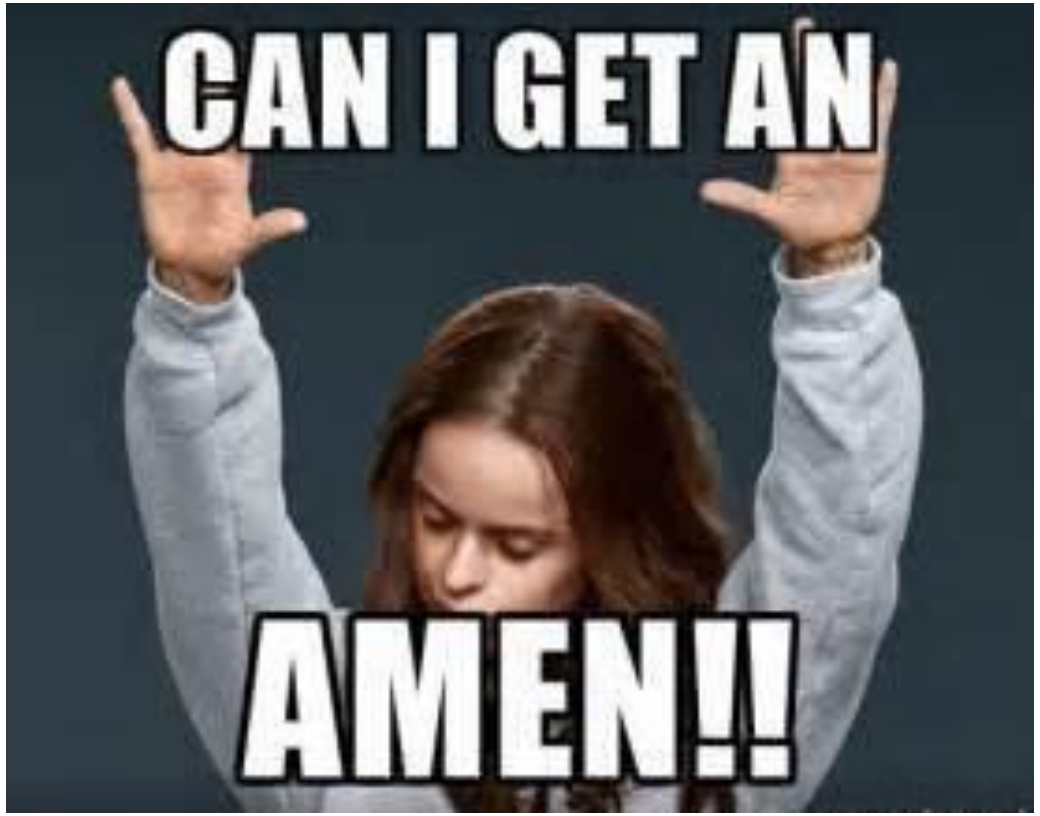
# LGBTQ+ Issues

- *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 dealt with whether owners of public accommodations can refuse certain services based on the First Amendment claims of free speech and free exercise of religion, and therefore be granted an exemption from laws ensuring non-discrimination in public accommodations - in particular, by refusing to provide creative services, such as making a wedding cake for the marriage of a gay couple, on the basis of the owner's religious beliefs.
- The Colorado Civil Rights Commission, evaluating the case under the state's anti-discrimination law, the Colorado Anti-Discrimination Act, found that the bakery had discriminated against the couple and issued specific orders for the bakery to follow.

# LGBTQ+ Issues

- In a 7-2 decision, the U.S. Supreme Court ruled on narrow grounds that the Commission did not employ religious neutrality, violating Masterpiece owner Jack Phillips' rights to free exercise, and reversed the Commission's decision. Court noted that many other exemptions had been granted by the Commission.
- The Court did not rule on the broader intersection of anti-discrimination laws, free exercise of religion, and freedom of speech, due to the complications of the Commission's lack of religious neutrality.


life's short
eat cake


CAN I GET AN
AMEN!!