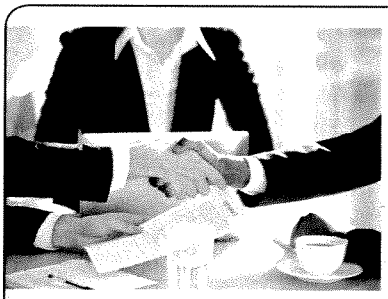
2018 Employment and Labor Law Institute

October 5, 2018

NEW MEXICO STATE
BAR FOUNDATION
CENTER FOR LEGAL EDUCATION



2018 Employment and Labor Law Institute

5.0 G 1.0 EP

Friday, October 5, 2018 • 9 a.m. - 4:30 p.m.
State Bar Center, Albuquerque

$99 Non-member not seeking CLE credit
$228 Early bird fee (Registration must be received by Sept. 5)
$251 Employment and Labor Law section members, government and legal services attorneys, and Paralegal Division members
$279 Standard Fee/Webcast Fee

Registration and payment for the program must be received prior to the program date. A $20 late fee will be incurred when registering the day of the program. This fee applies to live registrations only and does not apply to live webcasts.

Co-sponsor: Employment and Labor Law Section

8:45 a.m.	Registration and Refreshments
9 a.m.	**2018 EEOC Update** *Anne Noel Occhialino, EEOC/Appellate Services Office of General Counsel*
10 a.m.	**EEOC/Employment Law Update: Employer's Perspective** *Deborah D. Wells, Kennedy, Moulton & Wells PC*
11 a.m.	Break
11:15 a.m.	**Sexual Harassment Training in the "Me Too" Era** *Samantha Adams and Alana de Young, ADAMS+CROW LAW FIRM*
12:15 p.m.	Lunch (provided at the State Bar Center) **Employment and Labor Law Annual Meeting**
1:15 p.m.	**The Future of Arbitration Agreements in Employment Law** *Travis G. Jackson and Sarah K. Downey, Jackson, Loman, Stanford and Downey, PC*
2:30 p.m.	Break
2:45 p.m.	**The New Tax Act and Its Effect on Employment Law** *Bruce F. Malott, O2 CPA Consulting Group, LLC*
3:30 p.m.	**Conflicts of Interest and Ethical Considerations (1.0 EP)** *Christine E. Long, Disciplinary Board of the New Mexico Supreme Court*
4:30 p.m.	Adjournment

CLE Information

NEW MEXICO STATE
BAR FOUNDATION
CENTER FOR LEGAL EDUCATION

Overview

The Center for Legal Education (CLE) of the New Mexico State Bar Foundation is a self-sustaining, nonprofit entity dedicated to providing high quality, affordable, professional training and education programs to the legal community. Live credit options include live seminars, video webcasts, video replays and teleseminars. Self-study credit options include on-demand streaming videos from your computer and DVDs. CLE receives no subsidy from membership licensing fees.

CLE Credit Information

New Mexico

CLE will file New Mexico attorney CLE credits with the New Mexico Supreme Court MCLE Board within 30 days following programs. Credits for live programs and video replays are based on the attendee sign-in sheets at the registration desk. Credits for teleseminar and online courses—video webcasts and on-demand streaming videos—are based on phone call and website attendance reports accessed by staff. Certificates of attendance are not necessary. Credits for DVD courses must be filed by attendees.

Other States and Paralegal Division

CLE will provide certificates of attendance upon request. Attendees are responsible for forwarding certificates to the organizations to which they belong.

Center for Legal Education
New Mexico State Bar Foundation
P.O. Box 92860
Albuquerque, NM 87199-2860
505-797-6020 or 1-800-876-6227
cleonline@nmbar.org
www.nmbar.org

NEW MEXICO STATE BAR FOUNDATION
CENTER FOR LEGAL EDUCATION

Purpose and Use of Materials

These materials reflect the opinions of the authors and/or the reference sources cited and are not necessarily the opinions of the Center for Legal Education (CLE) of the New Mexico State Bar Foundation (NMSBF), the State Bar of New Mexico (SBNM), or any Division, Committee or Section thereof. They were prepared to furnish the participants with a general discussion of certain specific types of legal issues and problems commonly incurred in connection with representing clients in matters related to the subject of these materials. The issues selected for comment, and the comment concerning the issues selected, are not intended to be all-inclusive in scope, nor a definitive expression of the substantive law of the subject matters.

The issues discussed herein are intended as illustrative of the types of issues which can arise in the course of representation and are not intended to address, nor do they address the broad range of substantive issues which could potentially arise in the scope of such representation.

The authors/speakers suggest that careful independent consideration, to include a review of more exhaustive reference sources, be undertaken in representation of a client regarding this subject, and therefore the practitioner should not solely rely upon these materials presented herein.

No representation or warranty is made concerning the application of the legal or other principles discussed by CLE instructors or authors to any specific fact situation, nor is any prediction made concerning how any particular judge, or other official, will interpret or apply such principles. The proper interpretation or application of these materials is a matter for the considered judgment of the individual practitioner, and therefore CLE, NMSBF and SBNM disclaim all liability.

Disclaimer

Publications of the Center for Legal Education of the NMSBF and the SBNM are designed to provide accurate and current information with regard to the subject matter covered as of the time each publication is printed and distributed. They are intended to help attorneys and other professionals maintain their professional competence. Publications are sold with the understanding that CLE, NMSBF and SBNM are not engaged in rendering legal, accounting, or other professional advice. If legal advice or other expert assistance is required, the service of a competent professional should be sought. Attorneys using CLE, NMSBF and SBNM publications in dealing with specific legal matters should also research the original source of authority cited in these publications.

Photo Release

The majority of CLE programs are videotaped for later showings and are webcast over the Internet. In addition, a State Bar photographer may take photos of participants. These photos are for NMSBF and SBNM use only and may appear in publications and on the website. Your attendance constitutes consent for videotaping, photographing and its subsequent usage.

Speaker Biographies

Anne Noel Occhialino is an Acting Assistant General Counsel in the Equal Employment Opportunity Commission's Office of General Counsel. She carries her own case load and supervises the work of other attorneys. As an attorney in the Appellate Services section, she makes appeal recommendations in EEOC cases and makes amicus curiae recommendations in private sector cases. She represents the EEOC in the federal courts of appeals across the country, writing briefs and presenting oral argument. Occhialino also works with the Solicitor General's office on cases before the Supreme Court where the EEOC is either a party or an amicus. In 2018, she received the Chair's Champion of Opportunity Award and was part of a team that received the Chair's Circle of Excellence Award, which recognized the team's work in the area of sexual orientation discrimination. In 2012, Occhialino performed a four-month detail to the office of Commissioner Barker, one of the five EEOC commissioners. Also in 2012, Occhialino served as an adjunct professor of law for the University of New Mexico's inaugural "DC Semester Program." She previously taught seven semesters as an adjunct professor of Legal Writing and Research at the George Washington University Law School. Occhialino grew up in Albuquerque. She is a graduate of the Albuquerque Academy, Wesleyan University in Middletown, Connecticut, and the University of New Mexico School of Law. Following law school, she completed a two-year clerkship with the Honorable James A. Parker of the U.S. District Court for the District of New Mexico. After her clerkship, she was accepted into the EEOC's Honors Program and moved to Washington, DC.

Deborah Wells is a partner in the firm of Kennedy, Moulton & Wells, PC. Her practice is concentrated in the areas of employment, civil rights and governmental entity representation. She obtained a BA with majors in English and Second Education for the University of New Mexico in 1977 and MA in English literature from the University of New Mexico in 1985. She received her JD from the University of New Mexico School of Law in 1989, where she served as the managing editor of the New Mexico Law Review. Wells has been in private practice in Albuquerque since her admission to practice law in 1989.

She is past president of the Albuquerque Bar Association and fellow of the Center for Civic Values. She is a member of the State Bar of New Mexico and has served on the Specialization Committee for Employment and Labor Law. She is admitted to practice before all New Mexico state courts, the United States District court for the District of New Mexico, the Untied State Court of Appeals for the Tenth circuit and the Unties State Supreme Court. In addition to her litigation practice, Wells is a lecturer on various topics in employment law, civil right and governmental entity representation.

Samantha M. Adams
Managing Partner, ADAMS+CROW LAW FIRM
As a trial lawyer, Adams understands the value of sound legal guidance in advance of a trip to the courtroom and focuses her employment law practice on in-house training and developing strong employment policies/practices. She regularly advises management and BODs on employment/human resource matters (discipline/coaching, civil rights, contracts, negotiations,

covenants not to compete, trade practices, & avoiding litigation). Adams has extensive litigation experience before administrative and judicial tribunals.

Adams is an AV® Preeminent lawyer, recognized by *Benchmark* as one of the *Top 250 Women in Litigation* in the U.S., is consistently named in *Southwest Super Lawyers®* and has been previously recognized by her peers as one of the Top 25 *Southwest Super Lawyers®* in N.M. Adams regularly serves as an adjunct faculty member with the University of New Mexico School of Law where she teaches Employment Law and Education Law.

Alana De Young
***Partner,* ADAMS+CROW LAW FIRM**
Alana De Young's employment law practice includes consulting, advising, and representing both employers and employees on various federal, state and local employment law issues. De Young has worked with private and public employers of all sizes to provide trainings on discrimination, harassment, retaliation, and other workplace issues, to develop and update guidebooks, policies, and procedures, and to consult on a range of hiring, termination, leave, and other employment issues. De Young routinely represents clients in administrative proceedings, arbitrations, mediations, and litigation in federal and state courts throughout N.M.

De Young also works extensively with public school personnel on a wide range of legal issues. She often consults with human resources on employment issues, represents school districts in discharge and termination proceedings, works with administrators and staff in student discipline hearing, and represents school districts in various employment and tort claims in state courts.

Travis Jackson is a New Mexico Native — born in Farmington, raised in Albuquerque, and graduated with honors from the University of New Mexico School of Law in 2000. Jackson served as lead articles editor for the New Mexico Law Review. Upon graduation, he served as a law clerk to Chief Judge Jane A. Restani at the U.S. Court of International Trade in New York, N.Y., where he worked on complex international trade disputes, reviewed administrative decisions by the U.S. Department of Commerce, U.S. Trade Representative, Department of Homeland Security, International Trade Commission, as well as appeals that came before the U.S. Court of Appeals for the 3rd, 5th, 9th, and 11th Circuits, where Chief Judge Restani sat by designation. Upon completion of his clerkship in New York, Jackson returned to N.M. where he has practiced primarily employment relations law and commercial litigation.

Jackson has litigated commercial contract disputes, shareholder disputes, employment complaints, construction disputes, health care regulatory disputes, land use and development issues, trust and estate disputes, and news media related claims. Jackson has represented private sector employers against claims of discrimination filed before the Equal Employment Opportunity Commission and the N.M. Department of Workforce Solutions, as well as defended employers against employment relations claims in the state and federal courts of N.M. He advises clients concerning compliance with federal and state employment relations laws,

including Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act and the Fair Labor Standards Act. He has participated as a speaker in numerous seminars addressing employer groups on employment relations issues. Jackson also represents employers in Workers' Compensation proceedings.

Jackson is admitted to the State Bar of New Mexico, as well as the United States District Court for the District of New Mexico and the Unites States Tenth Circuit Court of Appeals.

Sarah K. Downey's practice focuses on labor and employment matters arising under federal and state law, including claims based on Title VII, FMLA, ADA, ADEA, ERISA, and common law contract and wrongful discharge claims. Downey has represented private sector employers against administrative claims of discrimination filed before the Equal Employment Opportunity Commission and the N.M. Department of Workforce Solutions and defended employers against employment claims in the state and federal courts of N.M. Downey also provides day-to-day preventative counseling and employment advice. Downey is admitted to practice before all New Mexico state and federal courts and the United States Court of Appeals for the Tenth Circuit.

Downey formerly served as a law clerk for the Honorable John E. Conway of the New Mexico Federal District Court and was in-house counsel for Sandia Corporation, which operates Sandia National Laboratories. At Sandia, Downey specialized in employment law, providing counsel to Sandia employees in the Human Resources Department, its internal Equal Employment Office, and its Employee and Labor Relations Office. Downey also managed employment-related litigation and administrative matters for the company and led the corporate e-discovery team. In 2013, Downey began practicing with J. Douglas Foster, Travis G. Jackson, and Meghan D. Stanford.

Bruce F. Malott, CPA, CFF, is the founder and managing principal of O2 CPA Consulting Group. O2 CPA is a boutique consulting and tax firm that specializes in helping small businesses navigate complex tax, funding, and profitability issues, as well as helping individuals achieve their personal financial goals. Beyond tax advice and business consulting, Malott is a nationally recognized forensic accounting expert with experience in testifying in over 100 cases.
Malott has lived in Albuquerque since 1975 when his father moved the family from Long Island, New York to New Mexico. He graduated from Arizona State University, and serves on the BBVA Compass Bank Advisory Board. In addition, Malott is a former member and secretary of the New Mexico Retiree Healthcare Authority, and former chairman of the Educational Retirement Board of New Mexico.

Malott is a certified public accountant, and is certified in financial forensics.

Christine E. Long, a native New Mexican, Ms. Long attended New Mexico State University and after a brief stint working for a winery in Denver she returned to New Mexico to attend law school at the University of New Mexico. Initially Ms. Long worked at the Roswell firm of what is now Hinkle Shanor before joining the Office of Disciplinary Counsel in 1993.

2018 EEOC Update

EEOC & Federal Law Update
Friday, October 5, 2018
Anne Noel Occhialino

Supreme Court Cases (Decided, will be decided, or may be decided!)

Mount Lemmon Fire District v. Guido, et al., No. 17-587 (S. Ct.) – The Age Discrimination in Employment Act (ADEA) defines an "employer" at 29 U.S.C. § 630(b) as a "person" engaged in interstate commerce with 20 or more employees. The second sentence of § 630(b) states that "the term also means . . . a . . . political subdivision of a state." The Supreme Court granted certiorari to decide whether political subdivisions must have 20 employees to qualify as an "employer," or whether the statute, by its plain terms, sets out a separate category of employers that includes political subdivisions, regardless of size. The Court heard oral argument on Monday, October 1, 2018. The EEOC has long taken the position, including before the Ninth Circuit in this case, that political subdivisions of any size are "employers" under the ADEA. The government filed an amicus brief in support of the Respondents, arguing that political subdivisions of any size are covered.

Altitude Express, Inc. v. Zarda, No. 17-1623 (S. Ct.)—This certiorari petition is pending. It raises the issue of whether Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination. The Second Circuit, sitting en banc, held that it does. This case is pretty interesting because before the Second Circuit, the Department of Justice argued that sexual orientation discrimination is *not* covered (under the Obama administration, DOJ thought it *was* covered), but the EEOC argued it *is* covered. The Seventh Circuit recently held that it is covered (*Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc), while the Eleventh Circuit (*Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017)) recently held that it is not. So, there is a clear circuit split. Will the Supreme Court take it?

Gerald Lynn Bostock v. Clayton County, Ga., No. 17-1618 (S. Ct.)—This certiorari petition is pending (the petitioner's reply was filed August 24, 2018). Like *Zarda*, it raises the issue of whether Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination. The Eleventh Circuit denied rehearing en banc; Judge Rosenbaum authored a passionate dissent from the denial of rehearing. She faulted the Eleventh Circuit for "cling[ing] to a 39-year-old-precedent, *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979)," which was decided before *Price Waterhouse* and offered only a single sentence stating that "'Discharge for homosexuality is not prohibited by Title VII.'" *Bostock v. Clayton Cty., Ga.*, 894 F.3d 1335 (11th Cir. 2018) (Rosenbaum, J., dissenting from denial of rehearing en banc).

Rizo v. Yovino, No. 18-272 (S. Ct.)—The Ninth Circuit issued an en banc decision in this Equal Pay Act (EPA) case, holding that an employee's "prior salary alone or in combination with other factors cannot justify a wage differential" between male and female employees. The court overruled its panel decision in *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), which had held that prior salary could be considered, and rejected the EEOC's view that prior salary standing alone is impermissible but that it may be considered in conjunction with other factors. There were three concurring

opinions. The petition for certiorari was filed August 30, 2018, and the response is due October 4, 2018.

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (S. Ct.)—The employer in this case filed a petition for certiorari on July 20, 2018. The response was due October 5, 2018. In the Sixth Circuit, the panel held unanimously that discrimination based on transgender status and/or transitioning constitutes discrimination based on sex under Title VII. The panel also held the that Religious Freedom Restoration Act did not operate as a defense where the employer claimed that employing a transgender worker imposed a substantial burden on his religious exercise. The only questions presented in the certiorari petition, however, pertain to the panel's holding that transgender and transitioning discrimination constitute sex discrimination under Title VII. The EEOC was the plaintiff in the district court and before the court of appeals, although the charging party (Aimee Stephens) intervened on appeal and will also represent herself before the Supreme Court. Five amicus briefs in support of the petitioner's petition for certiorari were filed, including one brief of sixteen states.

Tenth Circuit Cases

Lincoln v. BNSF Railway Co., No. 17-3120, -- F.3d -- , 2018 WL 3945875 (August 17, 2018) – After circulating the decision to all active members of the court and all active, non-recused members concurred, the panel overruled its precedent to hold that the filing of an EEOC charge is not a jurisdictional requirement. This means that the failure to timely file a charge does not deprive the court of jurisdiction; rather, an employer can raise it as an affirmative defense but it is subject to waiver, estoppel, and equitable tolling. The panel also confirmed that the ADA requires reassignment to a vacant position as a reasonable accommodation, despite an employer's "best qualified" policy; *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), which was about seniority systems, did not create an exception for "best qualified" policies. An employer may, however, point to such a policy to argue that although an employee technically was qualified, those qualifications fell significantly below another applicant's "such that reassignment is not reasonable or would place an undue hardship on the employer." The panel also criticized the appellants' counsel for filing a deficient appendix and denied their costs on appeal and instead permitted BNSF to recover its costs. This is a cautionary tale about the consequences for counsel of failing to follow the court's rules about the appendix.

LaCount v. South, LLC, No. 17-5075 (10th Cir.)—The EEOC and several other groups filed amicus briefs in this case about pregnancy discrimination and the standards for pleading a claim. The complaint alleged that after the plaintiff informed her employer she was pregnant and submitted a lifting restriction from her doctor, her employer told her that she was "a liability," placed her on involuntary medical leave, and then terminated her when her leave expired. Despite these allegations, the district court dismissed the plaintiff's complaint on the ground it failed to state a plausible pregnancy discrimination claim under Title VII. The EEOC's amicus brief argued that the district court erred in dismissing the complaint. The EEOC's brief might be of assistance to plaintiffs whose complaints are dismissed for a failure to state a claim under *Iqbal/Twombly*.

Mielnicki v. Wal-Mart Stores, Inc., No. 17-1396, 2018 WL 3046468 (10th Cir. June 20, 2018)—This is an ADA case involving a sixty-year-old woman with developmental disabilities (her mental capacity was that of a thirteen-year-old individual). The plaintiff had worked for Wal-Mart for fourteen years, as a shopping-cart attendant and then as a maintenance associate. For years, she worked the mintenance position without cleaning the restroom. But then another employee left, leaving this task to her. She was afraid a man would attack her while she was in the male restroom and so refused. Rather than accommodate Mielnicki, Wal-Mart fired her. The Tenth Circuit held that cleaning the restroom was an essential function (although she had not done it for years) and that Wal-Mart was not required to accommodate her.

***Tabura v. Kellogg USA*, 880 F.3d 544 (10th Cir. 2018)**—This is a Title VII religion case. The plaintiffs were two Seventh Day Adventists whose religion precluded them from working from Friday night through Saturday night at sundown. They were eventually fired because they refused to work their Saturday shifts. They sued, alleging failure to accommodate. The EEOC filed an amicus brief arguing that a reasonable accommodation must eliminate the conflict completely, and the employer failed to do that. EEOC also argued that the employer failed to show undue hardship because it regularly hired extra workers to cover absences. On appeal, the Tenth Circuit reversed, although its ruling was not a clear victory for the plaintiffs (or EEOC). The Court disagreed with the EEOC that, barring undue hardship, a reasonable accommodation must *eliminate* an employee's religious conflict with an employer's neutral job requirement. Seeming to contradict itself, however, the Court also held that "an accommodation will not be reasonable if it only provides Plaintiffs an opportunity to avoid working on some, but not all, Saturdays." Ultimately, the Court said, whether an accommodation is reasonable is usually a question for the finder of fact. Here, fact questions precluded summary judgment. The Tenth Circuit reversed summary judgment as to undue hardship (an alternative basis for summary judgment) because the parties had failed to brief it.

EEOC v. CollegeAmerica Denver, Inc., 869 F.3d 1171 (10th Cir. 2017)—This is a very complicated case, although at its core, it is about mootness and interference with an employee's rights. The plaintiff is a former employee. She and the employer signed a settlement agreement. The agreement required the plaintiff to "refrain from . . . contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica." The employer later believed she had breached the agreement (by filing charges with EEOC) and sued her in state court. EEOC then sued the employer in federal court, alleging that the company was retaliating against Potts and interfering with her right to communicate with the Commission in violation of the ADEA's anti-interference provision, 29 U.S.C. § 626(f). This provision prohibits waiver agreements that "may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission." The employer's general counsel submitted two affidavits disavowing any intent to interfere with the plaintiff's rights, and the district court accordingly dismissed the EEOC's interference claim as moot. The retaliation claim proceeded to trial. At trial, the employer came up with a new theory for

how the plaintiff was breaching the settlement agreement: she had failed to inform the company of adverse information about the company before telling the EEOC. EEOC appealed the dismissal of the interference claim. On appeal, the Tenth Circuit agreed with the EEOC that even if the district court was correct that the claim was moot at the time of its ruling, it became a live claim again during the litigation of the EEOC's retaliation claim when the company came up with its new theory of how the plaintiff was violating the settlement agreement. And the company might try to use that theory against the plaintiff in its state court lawsuit against the plaintiff. The EEOC's interference claim was therefore, the Tenth Circuit held, not moot.

EEOC v. JetStream Ground Servs., Inc., 878 F.3d 960 (10th Cir. 2017)—This is a Title VII religion case that went to trial. The EEOC argued that the employer discriminated against several Muslim women by refusing to hire them because they wore hijabs. EEOC sued for discrimination and retaliation. During discovery, plaintiffs requested all documents related to the nondiscriminatory reasons for not hiring the individuals. JetStream could not produce various documents, including notes and earlier versions of documents tracking hiring. EEOC filed a motion for sanctions for JetStream's failure to maintain the original versions of the recommendations in violation of EEOC regulations. EEOC argued that the court should either have excluded evidence related to the destroyed documents or issued an adverse inference instruction. The Tenth Circuit affirmed the jury's verdict. It ruled that the EEOC had waived its argument for exclusion of evidence by referring to the challenged evidence in its opening statement. The court also held that there was no abuse of discretion in the court's refusal to issue an adverse inference instruction, as EEOC had conceded that the documents were not destroyed in bad faith. Although the Tenth Circuit acknowledged circuit precedent holding that bad faith is *not* required when documents are destroyed in violation of EEOC's recordkeeping regulations, the court distinguished this precedent. The court suggested that it might one day, acting en banc, overrule its earlier precedent.

EEOC v. A&E Tire, Inc., No. 17-2362 (D. Colo. Sept. 5, 2018)—The employer filed a motion to dismiss the EEOC's Title VII complaint on the ground that the charging party, a transgender male, is not a member of a protected class. The district court denied the motion. It ruled that the complaint stated a claim of sex-stereotyping discrimination under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The district court acknowledged that the Tenth Circuit held in *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007), that Title VII's prohibition on sex discrimination did not include transgender individuals as a class but pointed out that *Etsitty* also allowed that transgender individuals could pursue sex-stereotyping claims.

NOTES

EEOC/Employment Law Update: Employer's Perspective

EEOC/Employment Law from the Employer's Perspective

In November, 2015, New Mexico was the number one state in which employers faced a chance of claims by employees, according to an article by Joel Jacobsen in the *Albuquerque Journal*. That article is attached and states, in part, that New Mexico employers "face a 66 percent higher chance of facing an employee charge than the national average. That's the highest risk in the nation." As pointed out by Mr. Jacobsen in his article, the New Mexico Human Rights Act "applies to companies with four or more employees, while federal law generally reaches only companies with 15 or more. For age discrimination, federal law applies only to companies with 20 or more employees."

I. Federal Sexual Orientation Discrimination Decisions

In recent years, federal appellate courts have begun to hold that sexual orientation claims are actionable under Title VII. On 2/26/18, the Second Circuit Court of Appeals (appellate court for New York, Connecticut and Vermont) made such a ruling in *Zarda v. Altitude Express, Inc.*, 855 F.3d 76 (2nd Cir. 2017).

Donald Zarda worked as a sky-diving instructor for Altitude Express in Long Island, New York. His instruction included tandem skydives, in which he was strapped hip-to-hip with clients. Zarda claimed to have a practice of advising his female clients that he was gay in order to alleviate any concerns they could have about being strapped in such a manner to a male. During one such jump, he advised his female student that he was gay "and had an ex-husband to prove it." The student, however, claimed that Zarda touched her inappropriately and only made the statement about his sexual orientation as an excuse for the touching. She complained to Altitude Express, which fired Zarda for violating company policy. Zarda brought suit under Title VII for gender discrimination, claiming that his termination was motivated by his sexual orientation.

The trial court dismissed Zarda's Title VII claim in 2014 because of existing legal precedent. In June 2015, the Supreme Court decided that same-sex marriage should be legal and the EEOC decided that allegations of discrimination based on sexual orientation were allegations of sex discrimination pursuant to Title VII. Zarda then appealed his case to the 2nd Circuit Court of Appeals. In April 2017, the 7th Circuit (appellate court for Illinois, Indiana and Wisconsin) became the first federal court of appeals to held that sexual orientation claims are actionable under Title VII. Shortly thereafter, the 2nd Circuit panel ruled that it would not reverse its prior circuit rulings that allegations of discrimination based on sexual orientation were not actionable under Title VII and invited the 2nd Circuit to hear the case *en banc*. The *en banc* 2nd Circuit court held that sexual orientation claims are actionable under Title VII, reversing the Circuit's previous rulings that it was not, despite acknowledging the New York State Human Rights Act, which had prohibited discrimination based on sexual orientation since 2003.

The Tenth Circuit Court of Appeals (appellate court for Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah, plus those portions of Yellowstone National Park extending into Montana and Idaho) remains in line with the majority of federal circuit courts and held in *Larson v. United Air Lines,* No. 11-1313 (10th Cir. 6/1/12) that sexual orientation claims were not actionable under Title VII.

The New Mexico Human Rights Act states:

> It is an unlawful discriminatory practice for:
>
> A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 USC Section 631(c)(1) and (2) shall apply to discrimination based on age; or if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity.

NMSA 28-1-7(A)

While discrimination on the basis of sexual orientation has been actionable under the New Mexico Human Rights Act for some time, it is still not actionable under Title VII pursuant to Tenth Circuit law.

II. Retaliation

In *Digital Realty Trust, Inc. v. Somers,* 583 US (2018), the United States Supreme Court held on February 21, 2018, that the anti-retaliation provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 covers only those employees who actually reported alleged securities violations to the SEC and that it did not cover those who had made internal complaints only. This ruling resolved a split in the federal appellate circuits on the issue.

III. Agency Guidance Documents

"US Department of Justice litigators may no longer rely on guidance documents issued by federal agencies as binding on regulated agencies for the purposes of affirmative civil enforcement litigation. The Department also specifies in a memorandum that such guidance documents cannot create any legal obligations for regulated entities." *Guidance Documents in Affirmative Civil Enforcement Cases,* National Law Revview, Friday, January 26, 2018. The Memorandum for Heads of Civil Litigating Components - United States Attorneys from the Associate Attorney General dated January 25, 2018 is attached.

IV. Service/Emotional Support Animals

Pursuant to Title II and Title III of the Americans with Disabilities Act ("ADA"), beginning on March 15, 2011, dogs (and in limited circumstances miniature horses) are recognized as service animals. A service animal means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Tasks performed can include pulling the handler's wheelchair, retrieving dropped items, alerting a person to a sound, reminding a person to take medication or pressing an elevator button.

Service animals are working animals, not pets. The work or task a dog has been trained to provide must be directly related to the person's disability. Dogs whose sole function is to provide comfort or emotional support do not qualify as services animals under the ADA.

Emotional support animals, comfort animals and therapy dogs are not service animals under Title II and III of the ADA. Other species of animals, whether wild or domestic, trained or untrained, are not considered service animals either. The work or tasks performed by a service animal must be directly related to the individual's disability. It does not matter if a person has a note from a doctor that the person has a disability and needs to have the animal for emotional support. A doctor's letter does not turn an animal into a service animal.

Examples of animals that fit the ADAs definition of "service animal" because they have been specifically trained to perform a task for the person with a disability include:

--Guide Dog or Seeing Eye Dog is a trained dog that serves as a travel tool for persons who have severe visual impairments or are blind;

-Hearing or Signal Dog is a dog that has been trained to alert a person who has a significant hearing loss or is deaf when a sound occurs, such as a knock on the door;

-Psychiatric Service Dog is a dog that has been trained to perform tasks that assist individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects. Tasks performed by psychiatric service dogs may include: reminding the handler to take medication; providing safety checks or room searches; turning on light for persons with Post

Traumatic Stress Disorder; interrupting self-mutilation by persons with dissociative identity disorders; keeping disoriented individuals from danger;

–Sensory Signal Dog or Social Signal Dog is a dog trained to assist a person with autism. The dog alerts the handler to distracting repetitive movements common among those with autism, allowing the person to stop the movement (e.g. hand flapping);

–Seizure Response Dog or Diabetes Dog is a dog trained to assist a person with a seizure disorder or diabetes. How the dog serves the person depends on the handler's needs. The dog may stand guard over the person during a seizure or diabetic episode or the dog may go for help. Some dogs have learned how to predict a seizure or high/low blood glucose episodes and warn the handler in advance to sit down or move to a safe place.

Under Title II and III of the ADA, the "service animal" designation is intended primarily for dogs. However, entities must make reasonable modifications in policies to allow individuals with disabilities to use miniature horses if they have been individually trained to do work or perform tasks pursuant to the training requirements above.

The State of New Mexico Governor's Commission on Disability indicates that the 2013 New Mexico State Legislature passed an update of the Service Animal Act which aligns New Mexico's statute with the 2011 updates to the ADA. The law became effective June 14, 2103 and prescribes that dogs (and miniature horses under 100 pounds) qualify as Service Animals.

NMSA 28-11-2 states (in pertinent part):

A. "emotional support animal", "comfort animal" or "therapy animal" means an animal selected to accompany an individual with a disability that does not work or perform tasks for the benefit of the individual with a disability and does not accompany at all times an individual with a disability;

B. "qualified service animal" means any qualified service dog or qualified service miniature horse that has been or is being trained to provide assistance to an individual with a disability, but "qualified service animal" does not include a pet, an emotional support animal, a comfort animal or a therapy animal;

C. "qualified service dog" means a dog that has been trained or is being trained to work or perform tasks for the benefit of an individual with a disability who has a physical or mental impairment that substantially limits one or more major life activities;

* * *

28-11-6. Prohibition of false presentation of animal as a qualified service animal.

A. A person shall not knowingly present as a qualified service animal any animal that does not meet a definition of "qualified service animal" pursuant to Section 28-11-2 NMSA 1978. A person who violates the provisions of this section is guilty of a misdemeanor and upon conviction shall be punished pursuant to Section 31-19-1 NMSA 1978.

NMSA Section 28-11-1, *et seq.*, NMSA 1978 (2016 Cum. Supp.)

The University of New Mexico Policy Office adopted the following guidelines for Service Animals on 5/15/15:

1.1 Service Animal

A service animal means any dog or other animal, except as otherwise specified, that is individually trained to do work or perform tasks for the benefit if a person with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. The work or tasks performed by the service animal must be directly related to the handler's disability. The crime deterrent effects of an animal's presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition. Therefore, comfort or companion animals are not Service Animals. For safety and infection control purposes, Service Animals shall not include nonhuman primates, birds, amphibians, reptiles, fish, hedgehogs, prairie dogs, cats or rodents.

1.2 Assistance Animal

An Assistance Animal means any animal that provides emotional support, comfort, or therapy that alleviates one or more identified symptoms or effects associated with its owner's disability. Unlike a Service Animal, an Assistance Animal need not be individually trained or certified to perform any disability-related tasks. Assistance Animals are sometimes referred to as therapy, comfort, companion or emotional support animals. Generally, Assistance Animals are not permitted in classrooms or in public areas on campus. In some circumstances, a student with a disability may be allowed to have an Assistance Animal within UNM Student Housing with prior approval.

The University of New Mexico informational publication provides the following (in pertient part):

> –A Guide or Seeing Eye Dog is Trained to Assist a person who is blind or visually impaired with way-finding
>
> –A Hearing Dog is trained to alert a person who is deaf or hearing impaired when a sound occurs
>
> –A Seizure Response Dog is trained to assist a person with a seizure disorder by alerting them in advance of a seizure or standing guard over the person during a seizure
>
> –A Psychiatric Service Dog is trained to detect the onset of a psychiatric episode and lessen the impact of the attack
>
> –A Mobility Dog is trained to assist a person with a disability to retrieve dropped items, and to provide physical support and assist with balance and stability.
>
> * * *
>
> **Remember:**
>
> –Emotional Support Animals (ESAs), comfort, or companion animals use an animal's natural instincts and companionship to comfort an individual. Support animals do not qualify as service animals under the Americans with Disabilities Act (ADA) because they are not trained to perform specific tasks, and they do not have public access access rights.
>
> * * *
>
> It is a misdemeanor to misrepresent a pet or ESA as a service animal in New Mexico.

The primary differences between a psychiatric service animals (PSAs) and emotional support animals (ESAs) are:

1. To be qualified to use a service animal, the person must be so impaired as to have a disability. For example, needing glasses for poor vision is an impairment, but being unable to see with or without glasses is a disability. Having a mental illness is an impairment, but being unable to function on a minimal level because of a mental illness is a disability. Only those actually disabled by a psychiatric impairment would qualify to use a psychiatric service dog;

2. Service animals are individually trained to actually do something which mitigates the person's disability. Their defined function is not to provide emotional support (affection on demand or an emotional security blanket) but to do something the handler cannot do for themselves which allows that handler to overcome or ameliorate an inability to perform major life activities;

3. A person with a disability has a right to be accompanied by a trained service dog which is assisting them in public accommodations. A person with an impairment or disability does not have the right to be accompanied by an emotional support animal unless otherwise dictated by the state in which the individual resides. New Mexico specifically adopts the ADA guidelines with regard to service animals and specifically excluding emotional support animals.

"Training" a dog to sit or stay or kissing on command and/or jumping in the owner's lap to be to hugged are not tasks qualifying the animal as a service animal. Real tasks for psychiatric service animals include counterbalance/bracing for a handler dizzy from medication, waking the handler on the sound of an alarm when the handler is heavily medicated and sleeps through alarms, doing room searches or turning on lights for persons with PTSD, blocking persons in dissociative episodes from wandering in danger (i.e. traffic), leading a disoriented handler to a designated person or place, waking a handler having a nightmare associated with PTSD, etc.

The PSA tasks are similar to those for persons with other disabilities. Guiding to a place and blocking from danger are common guide dog tasks. Signaling for an alarm is a common hearing dog task. Balancing/bracing and turning on lights are common mobility dog tasks.

Phillip Breen, Special Legal Counsel of the Disability Rights Section of the Office of Civil Rights, US Department of Justice stated: "An emotional support animal is not going to be a service animal under the ADA unless it does meet the [task] training requirement."

Sally Conway, Disability Rights Section, Office of Civil Rights, US Department of Justice stated: "Generally speaking, if we're talking about therapy, comfort, emotional support animals–and I think those typically are used interchangeably. Those are not going to be service animals under the ADA because they haven't been trained to–remember that three-part–that definition, they haven't been trained to do work or perform a task for the benefit of an individual with a disability. Typically, comfort, emotional support animals by their very presence certain perform a valuable service, but it's an innate ability. It's their mere presence. It doesn't reach the level of having been trained to do work and perform tasks."

The key distinction is that a PSA is actually trained to perform certain tasks that are directly related to an individual's psychiatric disability. The dog's primary role is not to provide emotional support. It is to assist the owner with the accomplishment of vital tasks they otherwise would not be able to perform independently. In addition, a PSA must not only respond to the handler's need for help, the dog must also be trained to recognize the need for help in the first place. Unless the dog is trained to work–to independently recognize and respond to its owner's

psychiatric disability–the dog does not qualify as a PSA and does not receive the protections of the ADA.

An EEOC resource document released in December 2016 as guidance for workplace accommodation of employees' mental health conditions does not mention the use of emotional support or service animals. Nevertheless, the EEOC appears to be taking the position that a service animal–and even an emotional support animal–might be a reasonable accommodation in the employment context, depending on the circumstances.

In *EEOC v. CRST Int'l, Inc.*, a Florida case filed March 2, 2017 by the EEOC, Leon Laferriere, a truck driver, requested to have his dog with him as he drove his trucking routes. Unlike some service dogs that perform physical tasks for the disabled individuals with vision, hearing, mobility and other impairments, the dog in this case admittedly provides only emotional support for its owner, who has post-traumatic stress and mood disorders. Plaintiff is a veteran whose service dog was individually trained as a PTSD service dog and specifically addressed plaintiff's needs, such as controlling his anxiety and waking him from nightmares caused by his PTSD. It is unclear whether Laferriere needs to regularly pet or hold his dog while driving his truck to reap the emotional support benefits or whether the dog's mere presence in the truck suffices.

In *Clark v. School District Five of Lexington and Richland Counties,* USDC S. Carolina 3/29/17, plaintiff argued that her dog, Pearl, should be allowed to accompany her to work as a service dog for her Post-Traumatic Stress Disorder and Panic Disorder with Agoraphobia. Defendants filed a Motion for Summary Judgment. The Magistrate Judge entered findings and conclusions granting defendants' Motion for Summary Judgment. The United States District Court judge declined to adopt the Magistrate Judge's recommendations, denying the defendant's Motion for Summary Judgment on the ADA.

The pertinent facts of the case are: In 1989, plaintiff lived in South Carolina when Hurricane Hugo hit the area. She was trapped with her family in a closet during the hurricane, which did significant damage to their home. She developed anxiety, panic attacks, agoraphobia and PTSD. Plaintiff began employment with the District as a special needs teacher at the Alternative Academy, which had in place the Healing Species Program, a pet therapy program for children with special needs. Plaintiff participated in the program, utilizing animals in the classroom to assist the students. In 2011, plaintiff adopted a Chihuahua puppy named Pearl. Pearl accompanied plaintiff to school as a therapy dog for the students. She wore a vest that identified her as a therapy dog and earned a service dog patch when she completed the requirements for a service dog. Pearl was trained in accordance with Delta Society standards, to respond specifically to plaintiff's symptoms of anxiety and developing panic attacks. Pearl was taught to stand her ground, create a barrier between plaintiff and others and put pressure on plaintiff's chest or lick her hand. Pearl is able was interrupt the process of plaintiff's panic attacks and give plaintiff something else to focus on.

When the Academy moved to a new location, a "no dogs allowed" policy was adopted. Plaintiff sued to be allowed to continue to have Pearl accompany her to school. In light of Pearl's specialized training and the fact that she had worked prior years as a therapy dog with no complaints, the District Court Judge found that, viewing the facts in the light most favorable to plaintiff, there was a question of fact as to the following: (1) whether plaintiff was able to perform the essential functions of her job without accommodation; (2) whether plaintiff was able to enjoy equal benefits and privileges of employment without accommodation; (3) whether plaintiff obstructed the interactive process and caused it to break down; (4) whether the District failed to act in good faith to engage with Plaintiff in the interactive process to identify a reasonable accommodate; and (5) whether plaintiff's requested accommodation was the only reasonable accommodation. (Whether an accommodation is reasonable is generally a question of fact for the jury.)

In *Arndt v. Ford Motor Company,* USDC Michigan 3/29/17, the Court granted summary judgment to defendant Ford Motor Company. In this disability discrimination action, plaintiff claimed that Ford violated the ADA by failing to engage in good faith in the interactive process regarding his request to have his service dog accompany him to work as an accommodation for his PTSD. Plaintiff served in the Army for 24 years, with numerous deployments in combat zones. It is undisputed that, as a result of his military experiences, he suffers from PTSD and mild traumatic brain injury. Plaintiff's dog, Cadence, was trained by Acadian Canine Training, LLC in three general areas: (1) general service dog behavior, including basic obedience, environmental and socialization training; (2) Post-Traumatic Stress Disorder service dog behavior, such as cue owner's anxiety and redirecting, focus, wake owner during nightmares, cue owner when unsuspecting individual walks towards him; and (2) Traumatic Brain Injury Service Dog behavior including carrying a pack with owner's personal effects, stability assistance and location and reminder services.

The Court granted Ford's Motion for Summary Judgment, reasoning (in part):

> Even Plaintiff's treating psychologist did not offer the opinion that Plaintiff's service dog could actually prevent Plaintiff from reacting to triggers in his manufacturing supervisor job. In fact it was Plaintiff who suggested to Dr. Lindsay-Westphal that he needed to have his dog with him and Plaintiff informed her that his dog was trained to get in between him and strangers and to sense when he was getting anxious. But Dr. Lindsay-Westphal had no professional knowledge of how service dogs were trained and could not express an opinion on how the dog would have helped Plaintiff to deal with certain situations on the plant floor when his PTSD otherwise would prevent him from performing his job. Specifically, in answering Primary Care Physician Questions, Dr. Lindsay-Westphal did not mention how the dog would assist Plaintiff on the plant floor. She mentioned that the dog helped Plaintiff to relax in social situations, going into

> stores, movie theaters and other public places. She opined that if he could have his dog in the car with him on his commute to work and under his desk at his office, the dog would provide calming interventions that would enable Plaintiff to complete his job duties. She never opined about Plaintiff's ability to meet the challenges presented by the plant floor environment with the assistance of his service dog. She testified that she is unfamiliar with the work environment at the plant and is not qualified to suggest specific accommodations. . .
>
> * * *
>
> The Court does not question that Mr. Tullier's training may have achieved the goal he set for training Cadence–the betterment of Plaintiff's life. However, his testimony regarding his training of Cadence is simply not sufficient to carry Plaintiff's burden to establish, by a preponderance of the evidence, that having Cadence by his side in all aspects of his job as a process coach would have enabled him to perform the essential functions of that high stress supervisory job at the Van Dyke plant.

Neither federal nor New Mexico public accommodation laws require businesses and organizations to accommodate disabled individuals with regard to their requested use of emotional support dogs or other emotional support animals. New Mexico statutory law makes it a crime to try to pass off an emotional support dog or pet as a legally-protected, disability-related service animal. And, while it requires accommodating a true service animal (defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability") the ADA expressly excludes emotional support dogs from the protections granted in Title III, which regulates public accommodations and an organization's obligations to guests, patrons, clients, etc.

Title I of the ADA–which prohibits disability discrimination in the employment context and affirmatively requires employers to provide reasonable accommodations to applicants and employees–is silent with regard to service dogs and other animals as examples of appropriate accommodations. While employers have a legal duty under Title I of the ADA to engage in the "interactive process" to determine whether an employee's request for a service dog is appropriate or an undue hardship, this area of the law is just beginning to unfold.

V. Medical Marijuana

The case of *Stanley v. County of Bernalillo* is a medical marijuana employment case currently before the New Mexico Court of Appeals. The United States District Court for the

District of New Mexico decided another medical marijuana employment case in *Garcia v. Tractor Supply Company,* 154 F.Supp.3d 1225, 32 A.D. Cases 824 (USDC NM 1/7/16).

United States District Judge William Johnson granted Defendant's Motion to Dismiss, stating: "This case concerns an issue of first impression in the District of New Mexico." Mr. Garcia suffered from HIV/AIDS, a serious medical condition as defined in the NMHRA. His physicians recommended that treatment of his condition include the use of medical marijuana. Mr. Garcia applied for and was issued a medical marijuana card under the New Mexico Medical Cannabis Program, which is authorized by the Lynn and Erin Compassionate Use Act. Mr. Garcia thereafter applied for a job at Tractor Supply. During his interview, Mr. Garcia advised Tractor Supply's hiring manager of his diagnosis of HIV/AIDS and his participation in the Medical Cannabis Program. Mr. Garcia was hired for the job and reported to a testing facility to undergo a drug test. The results of the drug test indicated that Mr. Garcia tested positive for cannabis metabolites. Mr. Garcia was then discharged on the basis of the positive drug test and he filed a complaint with the New Mexico Human Rights Division, alleging unlawful discrimination by Tractor Supply. He received a Determination of No Probable Cause from the New Mexico Human Rights Division and filed suit, alleging that Tractor Supply terminated him based on his serious medical condition and his physicians' recommendation to use medical marijuana.

The *Garcia* case "turns on whether New Mexico's Compassionate Use Act ("CUA") combined with the New Mexico Human Rights Act provides a cause of action for Mr. Garcia. Ever-present in the background of this case is whether the Controlled Substances Act preempts New Mexico state law." In analyzing the Compassionate Use Act and New Mexico Human Rights Act, Judge Johnson noted that, while some states, such as Connecticut and Delaware, have included within their medical marijuana acts affirmative requirements mandating that employers accommodate medical marijuana cardholders, New Mexico's medical marijuana act has no such affirmative language. Mr. Garcia argued that the CUA makes medical marijuana an accommodation promoted by the public policy of New Mexico and therefore medical marijuana is an accommodation that must be provided for by the employer under the NMHRA. Tractor Supply countered that the CUA only offers users of medical marijuana limited immunity against state criminal prosecution and imposes no duty on employers to accommodate the use of medical marijuana.

The Court cited to *Curry v. MillerCoors, Inc.*, No. 12-cv-02471-JLK, 2013 WL 4494307 (D. Colo. 8/21/13), in which an employee with hepatitis C who used medical marijuana failed his employer's drug test. That court held:

> ..."[d]espite concern for Mr. Curry's medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct. In other words, a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability.

The *Garcia* court then went on to cite to *Steele v. Stallion Rockies Ltd.*, No. 14-cv-02376 CMA/BNB, 2015 WL 3396417 (D. Colo. 5/26/15): "Magistrate Judge Wang also correctly concluded that there was no basis for finding that Defendants terminated Plaintiff's employment **because of** his disability; the Complaint fails to allege a single fact to support the notion that Plaintiff's medical condition, or any accommodation for a medical condition, led to his termination." *Garcia, id.* The Court then went on to hold: "Here, Mr. Garcia was not terminated because of or on the basis of his serious medical condition. Testing positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS."

The *Garcia* court next addressed the arguments that: (1) decisions by the New Mexico Court of Appeals holding that the Workers' Compensation Act authorizes reimbursement for medical marijuana demonstrate that medical marijuana use is a reasonable accommodation under the NMHRA and (2) the Justice Department has not been enforcing marijuana laws and held: (1) reliance on an enforcement policy of the United States Attorney General is not law, and instead, is an ephemeral policy that may change under a different President or different Attorney General; (2) there is a fundamental difference between requiring an insurance carrier to reimburse medical treatments that have been approved by a physician in a regulated system such as medical marijuana and requiring that an employer permit and accommodate an individual's marijuana use that is illegal under federal law.

> In sum, the Court finds that the CUA combined with the New Mexico Human Rights Act does not provide a cause of action for Mr. Garcia as medical marijuana is not an accommodation that must be provided for by the employer. Tractor Supply did not terminate Mr. Garcia because of his serious medical condition, as marijuana is not a manifestation of HIV/AIDS, nor is testing positive for marijuana conduct that resulted from Mr. Garcia's serious medical condition. While New Mexico state courts have found medical marijuana to be compensable under state workers' compensation laws, the Court finds a fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer's use of a drug that is still illegal under federal law.

Garcia, Memorandum Opinion and Order, p. 6-7

With regard to the interplay between the CSA and the NMCUA, the *Garcia* court cited with favor to two cases: *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 230 P.3d 518 (Or. 2010)(en banc) and *Washburn v. Columbia Forest Products, Inc.*, 134 P.3d 161, 167-68 (Or. 2006) and held:

> State medical marijuana laws that provide limited state-law immunity may not conflict with the CSA. But here, Mr. Garcia does not merely seek state-law immunity for his marijuana use. Thus, the Court finds the Oregon cases closest to the fact of this case and more persuasive. To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes.

Garcia, Memorandum Opinion and Order, p. 7-8.

Delivery alert until NaN

NM No. 1 in employee lawsuits

By Joel Jacobsen / Jacobsen's Counsel

Monday, November 16th, 2015 at 12:02am

We're No. 1. Which, I hate to admit, always strikes me as ominous when I hear it said about New Mexico.

Hiscox, a Bermuda-based family of companies that describes itself as a "specialist insurer," recently

Jacobsen's Counsel
Joel Jacobsen
legal column tips@gmail.com

issued a report comparing "employee lawsuit risk" for the 50 states plus Washington, D.C. The report concluded that New Mexico employers face "a 66 percent higher chance of facing an employee charge than the national average." That's the highest risk in the nation.

Although the title of Hiscox's study refers to lawsuits, its data were actually drawn from claims filed with the federal Equal Employment Opportunity Commission and the state Human Rights Bureau. Generally, employees must file a claim with one or the other commission before bringing an actual lawsuit. According to Hiscox, "most" claims never make it past the commission stage.

What explains New Mexico's position on top of the list? One obvious possibility is that the study is flawed. The report is vague about its methodology. I emailed Hiscox for additional information and received a polite response, but no additional information. But two Albuquerque employment lawyers I spoke to, Barbara G. Stephenson and Donald G. Gilpin, told me they found it plausible that New Mexico would rank high in national comparisons.

One important reason is that New Mexico's Human Rights Act, our anti-discrimination law, applies to companies with four or more employees, while federal law generally reaches only companies with 15 or more. For age discrimination, federal law applies only to companies with 20 or more employees.

The threshold number of employees required by other states varies. The Texas Commission on Human Rights Act, for instance, applies only to companies with 15 or more employees. So New Mexico may have more claims per capita because our statute casts a wider net. Or, to put it another way, many acts of discrimination prohibited in New Mexico are beyond the reach of the law in Texas and elsewhere.

Stephenson, who represents employers, says that she would expect more claims to be filed in states whose laws prohibit more practices. She mentioned California as an example of a state with a dense network of laws regulating business and, indeed, California ranks fourth among the states, with a 40 percent increased risk of employee claims.

New Mexico law isn't an extensive as California's, but it is still broader than federal law. New Mexico prohibits discrimination against gays and transgender people, who receive no protection under the federal EEOC statute, although just this past week President Obama proposed changing that. According to ACLU figures, 22 states and D.C. currently prohibit discrimination based on sexuality, which is another way of saying that the rest still permit it. That presumably accounts for some additional claims in New Mexico, although Stephenson reports it's not an active area of practice.

New Mexico also prohibits discrimination based on "spousal affiliation," a phrase I found mysterious. Gilpin, who represents employees, explained it with an example from his practice. A woman was married to a man with AIDS. Husband and wife had separate health insurance through their respective employers. When he lost his coverage, she tried to add him to hers. Her employer fired her before the change could take effect, in what seems to have been a transparent effort to hold down medical costs. That was discrimination based on spousal affiliation and it's illegal under New Mexico law.

Another possible explanation for the high ranking, one that contradicts New Mexicans' cherished self-image, is that there's more discrimination here than elsewhere. It's notable that five of the top 10 states in Hiscox's ranking are former members of the Confederacy. But while New Mexico was hardly innocent of Jim Crow laws, the legacy of segregation doesn't go far to explain the statewide ranking today. On the other hand, the sheer diversity of New Mexico multiplies the possible combinations that could result in discrimination.

Stephenson points out that New Mexico's workforce includes a very high percentage of government workers. According to data compiled by the Wall Street Journal in 2014, only three other (large and relatively underpopulated) states have more government workers per capita than New Mexico. The civil service protections enjoyed by such a large segment of the workforce might contribute to a general expectation of a vested right to one's job, Stephenson suggests.

Then, too, she notes that New Mexico's appellate courts are highly receptive to claims of employment discrimination. While few employment claims ever reach them, nonetheless, the judges at the top establish the law and the tone. She also describes the local EEOC office as "fairly aggressive."

Together, these theories describe systemwide forces contributing to New Mexico's high ranking. But, ultimately, an individual worker's decision to file a discrimination claim is a personal one. Gilpin, the plaintiff's lawyer, sees the decision-making process going through a series of steps.

Step one: New Mexico is an "at-will" state, meaning that employers are not required to give a reason for firing an employee. Supervisors who wish to spare themselves an embarrassing or upsetting scene lower the ax without warning or explanation. That leaves the fired worker trying to make sense of the disaster with no information beyond the obvious: "I was the only ____ in that division and I was the only one they canned."

Step two: Generally speaking, a fired employee is entitled to unemployment compensation unless he or she was fired for misconduct but, over the past few years, the definition of "misconduct" has expanded, according to Gilpin.

He told me the story of a waitress who was nearly killed by a drunk driver as she drove home from work. It took months to recover from her injuries. In the interim, the restaurant had no choice but to replace her. But when she filed for unemployment benefits, the restaurant fought back, claiming she was fired for "misconduct" – failure to show up for work. Amazingly enough, the hearing officer ruled in favor of the restaurant. That decision was reversed on appeal to the district court, but it shows how the wind is currently blowing.

In one important way, the expanding meaning of "misconduct" has helped employers, reducing premiums. But when an employee is fired without explanation and the employer then tries to keep him or her from receiving the relative pittance that might prevent eviction or foreclosure, it "feels personal," Gilpin says.

Step three: Discrimination claims against an employer have to be filed within 300 days. That puts pressure on the employee to decide whether to file during a period when he or she is feeling most angry and desperate. Given that it costs nothing to file a claim, why wouldn't you? As Gilpin says, "It's fight or flight, right?"

Gilpin suggests a longer statute of limitations would allow workers to put off the decision to file until

after they find a new job, when many would choose to let the matter go.

The Hiscox report, freely available online, has some suggestions for employers about avoiding claims. But I think the best advice (after "don't discriminate or retaliate") addresses Gilpin's step one. Performance-based termination should always be preceded by fair warning and termination for any reason should be accompanied by an honest explanation. For employers, doing the decent thing is also self-protection.

Attorney Marshall G. Martin in private practice in Albuquerque. He has experience in complex litigation, including securities, antitrust and lender liability law. He also has represented banks, and private and public companies. He can be reached at 505-228-8506 or mgm@marshallgmartin.com.

NASCAR

Darlington Throwback: Racers ready to blast through the past

Leaders wreck, handing Haley win in Truck playoff opener

Justin Allgaier takes Xfinity race at Road America

The Latest: Allgaier wins Xfinity race at Road America

The Latest: And they're off for Xfinity race at Road America

883 F.3d 100

Melissa ZARDA, co-independent executor of the estate of Donald Zarda, and William Allen Moore, Jr., co-independent executor of the estate of Donald Zarda, Plaintiffs–Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and Ray Maynard, Defendants–Appellees.

Docket No. 15-3775
August Term, 2017

United States Court of Appeals, Second Circuit.

Argued: September 26, 2017
Decided: February 26, 2018

Gregory Antollino, New York, NY (Stephen Bergstein, Bergstein & Ullrich, LLP, Chester, NY, on the brief), for Plaintiffs–Appellants.

Saul D. Zabell, Zabell & Associates, P.C., Bohemia, NY, for Defendants–Appellees.

Jeremy Horowitz (James L. Lee, Deputy General Counsel, Jennifer S. Goldstein, Associate General Counsel, and Anne Noel Occhialino, Senior Appellate Attorney, on the brief), Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae Equal Employment Opportunity Commission, in support of Plaintiffs–Appellants.

Gregory R. Nevins (Michael D.B. Kavey, Attorney at Law, Brooklyn, NY; Omar Gonzalez–Pagan and Sharon M. McGowan, on the brief), Lambda Legal Defense and Education Fund, Inc., New York, NY, for Amicus Curiae Lambda Legal Defense and Education Fund, Inc., Atlanta, GA, in support of Plaintiffs–Appellants.

Hashim M. Mooppan (Chad A. Readler and Tom Wheeler, Acting Assistant Attorneys General, Charles W. Scarborough and Stephen R. Marcus, Attorneys, on the brief), United States Department of Justice, Washington, DC, for Amicus Curiae United States of America, in support of Defendants–Appellees.

Adam K. Mortara, Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL, court-appointed Amicus Curiae in support of Defendants–Appellees.

Erin Beth Harrist and Christopher Dunn, New York Civil Liberties Union Foundation, New York, NY; Fatima Goss Graves, National Women's Law Center, Washington, DC; Ria Tabacco Mar, Leslie Cooper, James D. Esseks, Lenora M. Lapidus, and Gillian L. Thomas, American Civil Liberties Union Foundation, New York, NY, for Amici Curiae American Civil Liberties Union; New York Civil Liberties Union; National Women's Law Center; 9to5, National Association of Working Women; A Better Balance; California Women's Law Center; Equal Rights Advocates; Feminist Majority Foundation; Gender Justice; Legal Voice; National Organization for Women (NOW) Foundation; National Partnership for Women & Families; Southwest Women's Law Center; Women Employed; Women's Law Center of Maryland, Inc.; and Women's Law Project, in support of Plaintiffs–Appellants.

Richard E. Casagrande, Robert T. Reilly, Wendy M. Star, and Christopher Lewis, New York State United Teachers, Latham, NY, for Amicus Curiae New York State United Teachers, in support of Plaintiffs–Appellants.

Richard Blum and Heidi Cain, The Legal Aid Society, New York, NY, for Amicus Curiae The Legal Aid Society, in support of Plaintiffs–Appellants.

Alice O'Brien, Eric A. Harrington, and Mary E. Deweese, National Education Association, Washington, DC, for Amicus Curiae The

National Education Association, in support of Plaintiffs–Appellants.

Mary Bonauto, GLBTQ Legal Advocates & Defenders, Boston, MA; Christopher Stoll, National Center for Lesbian Rights, San Francisco, CA; Alan E. Shoenfeld, David M. Lehn, and Christopher D. Dodge, Wilmer Cutler Pickering Hale and Dorr LLP, New York, NY, Washington, DC, and Boston, MA, for Amici Curiae GLBTQ Legal Advocates & Defenders ("GLAD") and National Center for Lesbian Rights ("NCLR"), in support of Plaintiffs–Appellants.

Thomas W. Burt, Microsoft Corporation, Redmond, WA; Sigismund L. Sapinski, Jr., Sun Life Financial (U.S.) Services Company, Inc., Windsor, CT; Todd Anten, Justin T. Reinheimer, and Cory D. Struble, Quinn Emanuel Urquhart & Sullivan, LLP, New York, NY, for Amici Curiae AdRoll, Inc.; Ben & Jerry's; Beterment; Boston Community Capital; Brandwatch; CBS Corporation; Citrix Systems, Inc.; City Winery; Davis Steadman Ford & Mace, LLC; DoorDash, Inc.; Dropbox, Inc.; Eastern Bank; Edelman; FiftyThree, Inc.; Freedom for All Americans Education Fund; Google Inc.; Greater Burlington Industrial Corporation; Gusto; Harvard Pilgrim Health Care, Inc.; IAC/InterActiveCorp; IHS Markit Ltd.; Indiegogo; INUS Group LLC; Johnston, Kinney & Zulaica LLP; Kargo; KEO Marketing Inc.; Kickstarter, PBC; Levi Strauss & Co.; Linden Lab; Lyft, Inc.; Mapbox, Inc.; National Gay & Lesbian Chamber of Commerce; OBOX Solutions; On 3 Public Relations; Physician's Computer Company; Pinterest; Puma Springs Vineyards; Quora Inc.; S&P Global Inc.; Salesforce; Shutterstock, Inc.; Spotify; Thumbtack; TodayTix; Trust Company of Vermont; Vermont Gynecology; Viacom, Inc.; and Wealthfront Inc., in support of Plaintiffs–Appellants.

Peter T. Barbur, Cravath, Swaine & Moore LLP, New York, NY, for Amici Curiae Sen. Jeffrey A. Merkley, Sen. Tammy Baldwin, Sen. Cory A. Booker, and Rep. David N. Cicilline, in support of Plaintiffs–Appellants.

Matthew Skinner, LGBT Bar Association of Greater New York ("LeGaL"), New York, NY, for Amici Curiae LGBT Bar Association of Greater New York ("LeGaL"), Anti–Defamation League, Asian American Bar Association of New York, Association of the Bar of the City of New York, Bay Area Lawyers for Individual Freedom, Hispanic National Bar Association, Legal Aid at Work, National Queer Asian Pacific Islander Alliance, New York County Lawyers' Association, and Women's Bar Association of the State of New York, in support of Plaintiffs–Appellants.

Eric T. Schneiderman, Attorney General, Barbara D. Underwood, Solicitor General, Steven C. Wu, Deputy Solicitor General, Andrew W. Amend, Senior Assistant Solicitor General of Counsel, State of New York, New York, NY; George Jepsen, Attorney General, State of Connecticut, Hartford, CT; Thomas J. Donovan, Jr., Attorney General, State of Vermont, Montpelier, VT, for Amici Curiae State of New York, State of Connecticut, and State of Vermont, in support of Plaintiffs–Appellants.

Joseph W. Miller, U.S. Justice Foundation, Ramona, CA; William J. Olson, Herbert W. Titus, Robert J. Olson, and Jeremiah L. Morgan, William J. Olson, P.C., Vienna, VA, for Amici Curiae Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation, in support of Defendants–Appellees.

Kimberlee Wood Colby, Christian Legal Society, Springfield, VA, for Amici Curiae Christian Legal Society and National Association of Evangelicals, in support of Defendants–Appellees.

Before: Katzmann, Chief Judge, Jacobs, Cabranes, Pooler, Sack, Raggi, Hall,

Livingston, Lynch, Chin, Lohier, Carney, and Droney, Circuit Judges.*

Katzmann, C.J., filed the majority opinion in which Hall, Chin, Carney, and Droney, JJ., joined in full, Jacobs, J., joined as to Parts I and II.B.3, Pooler, J., joined as to all but Part II.B.1.b, Sack, J., joined as to Parts I, II.A, II.B.3, and II.C, and Lohier, J., joined as to Parts I, II.A, and II.B.1.a.

Jacobs, J., filed a concurring opinion.

Cabranes, J., filed an opinion concurring in the judgment.

Sack, J., filed a concurring opinion.

Lohier, J., filed a concurring opinion.

Lynch, J., filed a dissenting opinion in which Livingston, J., joined as to Parts I, II, and III.

Livingston, J., filed a dissenting opinion.

Raggi, J., filed a dissenting opinion.

Katzmann, Chief Judge:

[883 F.3d 107]

Donald Zarda,[1] a skydiving instructor, brought a sex discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII") alleging that he was fired from his job at Altitude Express, Inc., because he failed to conform to male sex stereotypes by referring to his sexual orientation. Although it is well-settled that gender stereotyping violates Title VII's prohibition on discrimination "because of ... sex," we have previously held that sexual orientation discrimination claims, including claims that being gay or lesbian constitutes nonconformity with a gender stereotype, are not cognizable under Title VII.[2] *See Simonton v. Runyon* , 232 F.3d 33, 35 (2d Cir. 2000) ; *see also Dawson v. Bumble & Bumble* , 398 F.3d 211, 217–23 (2d Cir. 2005).

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission ("EEOC" or "Commission"). *See, e.g.* , *Kalich v. AT&T Mobility, LLC* , 679 F.3d 464, 471 (6th Cir. 2012) ; *Prowel v. Wise Bus. Forms, Inc.* , 579 F.3d 285, 289 (3d Cir. 2009) ; *Medina v.Income Support Div.* , 413 F.3d 1131, 1135 (10th Cir. 2005) ; *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.* , 224 F.3d 701, 704 (7th Cir. 2000) ; *Higgins v. New Balance Athletic Shoe, Inc.* , 194 F.3d 252, 259 (1st Cir. 1999) ;[3] *Wrightson v. Pizza Hut of Am., Inc.* , 99 F.3d 138, 143 (4th Cir. 1996) ; *Williamson v. A.G. Edwards & Sons, Inc.* , 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Blum v. Gulf Oil Corp.* , 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *see also Johnson v. Frank* , EEOC Decision No. 01911827, 1991 WL 1189760, at *3 (Dec. 19, 1991). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that "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." *Baldwin v. Foxx* , EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (quoting

[883 F.3d 108]

Price Waterhouse v. Hopkins , 490 U.S. 228, 242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by *Blum* , 597 F.2d at 938, which "ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc* ." *Evans v. Ga. Reg'l Hosp.* , 850 F.3d 1248, 1257 (11th Cir.), *cert. denied* , --- U.S. ----, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017). One month

later, the Seventh Circuit, sitting en banc, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation is a form of sex discrimination." *Hively* , 853 F.3d at 340–41. In addition, a concurring opinion of this Court recently called "for the Court to revisit" this question, emphasizing the "changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued," and identifying multiple arguments that support the conclusion that sexual orientation discrimination is barred by Title VII. *Christiansen v. Omnicom Grp., Inc.* , 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, *C.J.* , concurring) ("Christiansen and *amici* advance three arguments, none previously addressed by this Court ...."); *see also id.* at 204 ("Neither *Simonton* nor *Dawson* addressed [the but-for] argument.").

Taking note of the potential persuasive force of these new decisions, we convened en banc to reevaluate *Simonton* and *Dawson* in light of arguments not previously considered by this Court. Having done so, we now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination "because of ... sex." To the extent that our prior precedents held otherwise, they are overruled.

We therefore **VACATE** the district court's judgment on Zarda's Title VII claim and **REMAND** for further proceedings consistent with this opinion. We **AFFIRM** the judgment of the district court in all other respects.

BACKGROUND

The facts and procedural history of this case are discussed in detail in our prior panel decision. *See Zarda v. Altitude Express* , 855 F.3d 76, 79–81 (2d Cir. 2017). We recite them only as necessary to address the legal question under consideration.

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay "and ha[d] an ex-husband to prove it." J.A. 400 ¶ 23. Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda's alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda's boss, who fired shortly Zarda thereafter.

[883 F.3d 109]

Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." Special Appendix ("S.A.") 3. In particular, he claimed that "[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." S.A. 5.

In September 2010, Zarda brought a lawsuit in federal court alleging, *inter alia* , sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. Defendants moved for summary judgment arguing that Zarda's Title VII claim should be dismissed because, although "Plaintiff testifie[d] repeatedly that he believe[d] the reason he was terminated [was] because of his sexual orientation ... [,] under Title VII, a gender stereotype cannot be predicated on sexual orientation." Dist. Ct. Dkt. No. 109 at 3 (citing *Simonton* , 232 F.3d at 35). In March 2014, the district court granted summary judgment to the defendants on the Title VII claim. As relevant here, the district court concluded that, although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII.

While Zarda's remaining claims were still pending, the EEOC decided *Baldwin* , holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." 2015 WL 4397641 at *10. The Commission identified three ways to illustrate what it described as the "inescapable link between allegations of sexual orientation discrimination and sex discrimination." *Id.* at *5. First, sexual orientation discrimination, such as suspending a lesbian employee for displaying a photo of her female spouse on her desk while not suspending a man for displaying a photo of his female spouse, "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* Second, it is "associational discrimination" because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex." *Id.* at *6. Lastly, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes," most commonly "heterosexually defined gender norms." *Id.* at *7–8 (internal quotation marks omitted). Shortly thereafter, Zarda moved to have his Title VII claim reinstated based on *Baldwin* . But, the district court denied the motion, concluding that *Simonton* remained binding precedent.

Zarda's surviving claims, which included his claim for sexual orientation discrimination under New York law, went to trial, where defendants prevailed. After judgment was entered for the defendants, Zarda appealed. As relevant here, Zarda argued that *Simonton* should be overturned because the EEOC's reasoning in *Baldwin* demonstrated that *Simonton* was incorrectly decided. By contrast, defendants argued that the court did not need to reach that issue because the jury found that they

[883 F.3d 110]

had not discriminated based on sexual orientation.

The panel held that "Zarda's [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII." *Zarda* , 855 F.3d at 81. However, the panel "decline[d] Zarda's invitation to revisit our precedent," which "can only be overturned by the entire Court sitting in banc." *Id.* at 82. The Court subsequently ordered this rehearing en banc to revisit *Simonton* and *Dawson* 's holdings that claims of sexual orientation discrimination are not cognizable under Title VII.

DISCUSSION

I. Jurisdiction

We first address the defendants' challenge to our jurisdiction. Article III of the Constitution

GEOFFREY LARSON, Plaintiff-Appellant,
v.
UNITED AIR LINES, Defendant-Appellee.

No. 11-1313

UNITED STATES COURT OF APPEAL TENTH CIRCUIT

Filed: June 1, 2012

(D.C. No. 1:09-CV-02745-RPM)
(D. of Colo.)

ORDER AND JUDGMENT

Before **MURPHY, HARTZ,** and **TYMKOVICH,** Circuit Judges.

United Air Lines furloughed Geoffrey Larson from his manager position as a part of a wide-ranging corporate restructuring in 2008. Larson brought this lawsuit under Title VII and Colorado state law, alleging that UAL furloughed him on the basis of sex and sexual orientation. The district court granted UAL summary judgment.

We have jurisdiction under 28 U.S.C. § 1291 and affirm. Larson failed to produce evidence that UAL's decision to furlough him was based on anything

Page 2

other than its need to reduce workforce as a result of a corporate restructuring, and that it did not prefer women over men in the process.

I. Background

Larson began working at UAL in 1999, ultimately being promoted from his position as a customer service representative to an operating manager in the Denver station. Throughout his tenure at UAL, Larson identified himself as gay.

Larson's claims of discrimination arise from a series of events which began in December 2007. Around that time, an anonymous, type-written letter was found in the employee break room. The letter expressed concern that "a lot of management and supervisors new and old are homosexuals" (naming Larson and his female supervisor, as well as other individuals), and that a particular female employee had received preferential treatment as a result of her relationship with the supervisor. App. at 134. UAL commenced an investigation into the letter and invited Larson to be a part of the investigation, but he declined because he "felt harassed by the letter." *Id.* at 52. The general manager of the Denver station, Mike Scanlan, issued a response to the Denver employees stating that the letter was "malicious and inappropriate," and "wholly unacceptable" in light of UAL's "zero tolerance harassment and discrimination policy." Id. at 139. The author of the letter was never found.

The next incident Larson complains of happened a few weeks later. In an unrelated matter, a group of approximately 65 UAL employees sent a signed letter

Page 3

to a number of managers above Larson, complaining about Larson's management style—mainly that he skipped briefings and preferred to observe his employees from his office via video instead of working directly with them. In part as a result of this letter, Larson was transferred laterally to a different management position. In his new role as the Manager of Business and Manpower Administration, Larson reported to Todd Sprague. Larson had known Sprague for several years because Larson's former partner was good friends with Sprague.

In April 2008, a second anonymous letter was distributed to "United Management." Id. at 156. The letter complained generally about

agents "turn[ing] against each other" and "nasty letters," ultimately concluding that the problems stemmed from a lack of mutual respect. *Id.* The letter said that no one should care "what sexual preference you may have," because it has nothing "to do with the job [you] have been given." *Id.* The letter did not mention Larson personally. The author purported to be a customer service representative who merely "want[ed] to come to work and do the job for which" he had been hired and the letter was distributed to "United Management" generally, including a copy slipped under Larson's door. *Id.* The author closed by stating "[p]lease don't take this letter as negative. It is written with respect to all involved." *Id.* Larson reported the letter to Sprague and said that he "was feeling intimidated and harassed by yet another anonymous letter." *Id.* at 52. According to Larson, Sprague did not pursue any investigation into the letter because he did not view it

Page 4

as derogatory and considered Larson's report to be an overreaction. *Id.* at 76. Larson admitted that the substance of the letter was not problematic, but rather, he did not "like working in an environment where" discussions of sexual orientation "continue[d] to happen." *Id.* at 75.

As part of his new responsibilities as the Manager of Business and Manpower Administration, in May 2008, Larson was tasked with conducting the bid process for union employee shifts. Sprague warned Larson to make sure that the process went smoothly because the previous bid process, prior to Larson's arrival in the unit, had included a number of errors. But despite Sprague's warnings, Larson used an incorrect seniority list, requiring UAL to redo the process and delay bidding by a week.

In the summer of 2008, UAL and other airlines faced serious financial pressures as a result of rising costs. It responded with a national reduction of its workforce, including a furlough of more than 1,000 employees.

In Denver, UAL determined that five of its eighteen managers at Larson's level were to be furloughed and commenced a process to identify which employees had the lowest performance rankings. Prior to the furlough, four left voluntarily, leaving only one position to be furloughed.

To decide which manager to furlough, UAL completed a performance review of each manager, ranking managers according to their experience in airport operations and cargo, field operations, and labor union relations, in

Page 5

addition to their skills in meeting job requirements and leading people. Each review was completed by the direct manager of the employee, and then all of the managers met together to compare outcomes. Sprague completed Larson's evaluation, and Larson agreed that the assessment was "accurate" and that he did not disagree with "anything in any way that [Sprague] assessed" him. *Id.* at 88-89. Subsequent disclosure of the rankings indicated that Larson received the lowest score of the remaining managers at his level in Denver.

As a result of his review scores, Larson was furloughed in August 2008. As a member of the union, Larson was entitled to return to work as a customer service representative, but was immediately furloughed from that position for lack of seniority. Once Larson was notified of the management furlough, his attorney wrote a letter to UAL complaining of discrimination and retaliation.

After being furloughed, Larson brought three claims, alleging: (1) Title VII discrimination and retaliation; (2) Colorado state law discrimination and retaliation; and

(3) violations of Colorado's off-duty conduct law. The district court allowed discovery and ultimately granted summary judgment on all claims.

II. Discussion

We review the grant of summary judgment de novo, employing the same standards as the district court. *Twigg v. Hawker Beechcraft Corp.*, 659 F.3d 987, 997 (10th Cir. 2011). Summary judgment is only proper if the record shows "that there is no issue as to any material fact and that the moving party is entitled to

Page 6

judgment as a matter of law." Fed. R. Civ. P. 56(c); *Public Serv. Co. of Colo. v. Continental Cas. Co.*, 26 F.3d 1508, 1513-14 (10th Cir. 1994).

As a preliminary matter, it is worth noting that Larson's contention that his own testimony should be afforded significant weight as evidence in this matter is incorrect. Citing Federal Rule of Evidence 701, Larson argues that, particularly in discrimination cases, opinions or inferences from lay witnesses should be permitted because the witness can often provide insight about the underlying circumstances at a defendant's business. *See* Aplt. Br. at 11 n.2; *Gossett v. Okla. ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1179 (10th Cir. 2001). But Larson ignores the fact that his testimony is filled with unsubstantiated allegations, rather than potentially admissible opinion testimony.

Typically, "[u]nsubstantiated allegations carry no probative weight in summary judgment proceedings"; thus, to defeat a motion for summary judgment, "evidence, including testimony, must be based on more than mere speculation, conjecture, or surmise." *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875-76 (10th Cir. 2004) (finding that plaintiff's own speculation was not sufficient to defeat summary judgment); *see also Hester v. BIC Corp.*, 225 F.3d 178, 185 (2d Cir. 2000) (finding that "in an employment discrimination action, Rule 701(b) bars lay opinion testimony that amounts to a naked speculation concerning the motivation for a defendant's adverse employment decision"). Accordingly, as the

Page 7

district court did, we consider only the portions of the record that could be considered admissible testimony under the Rules of Evidence.

Larson's complaint presented four claims for relief, which we address in turn.

A. Title VII Discrimination

Larson first argues that UAL discriminated against him on the basis of his sex. He claims the company favored women managers over men, and that he was consequently furloughed because of his sex.

To prevail on a Title VII sex discrimination claim, Larson must first establish a prima facie case by showing that (1) he belonged to a protected class, (2) he was qualified for his position, (3) he suffered an adverse employment action, and (4) his position was not thereafter eliminated, or some other circumstances surrounding the adverse action, such as a decisionmaker's discriminatory remarks or preferential treatment toward employees outside the protected class, "give rise to an inference of discrimination." *Plotke v. White*, 405 F.3d 1092, 1099-1101 (10th Cir. 2005). If he does this, the burden shifts to UAL to show that a valid non-discriminatory reason existed for the challenged action. *Id.* at 1099. The burden then shifts back to Larson to show that UAL's explanation is merely a pretext for discrimination. *Id.*[1]

Page 8

Larson's claim is one of reverse discrimination. For such a claim to advance, "It is not enough . . . for a plaintiff merely to allege that he was a qualified man who was treated differently than a similarly situated woman." *Adamson v. Multi Cmty. Diversified Servs., Inc.*, 514 F.3d 1136, 1150 (10th Cir. 2008). Instead, a plaintiff must present "evidence sufficient to support a reasonable inference that, *but for* his status as a man, the challenged decision would not have occurred." *Id.* (emphasis in original).

A review of the record evidence produced by Larson does not support a reverse discrimination claim, nor does it create an inference that UAL's decision to furlough Larson was a pretext for sex discrimination. First, and most tellingly, of the managers who were retained after the furlough, only one was female (Kelly Holder) and the other eleven were male. Larson's direct supervisor, Sprague, was male, and Larson admitted that none of the other managers who participated in the furlough decision ever made disparaging remarks based on gender. Larson also admits that he was replaced by a man. Taken in sum, these facts provide no basis that UAL discriminated against Larson on the basis of his sex.

Page 9

In response, Larson points to the treatment of two women, a supervisor and Kelly Holder, to support his claims. He claims the two women received preferential treatment by being promoted and not being furloughed, respectively. UAL responds that, even if these circumstances point to differential treatment, such treatment is not sufficient to make out a case for reverse discrimination based on sex. *See id.* at 1150 (finding that differential treatment is insufficient to state a claim for reverse discrimination). We agree.

The supervisor Larson points to was Larson's supervisor prior to his transfer. Larson argues that she was promoted to a higher position, while he was instead transferred laterally. But Larson never applied for the position that his former supervisor was promoted to. She, moreover, is not similarly situated to Larson because she was at a different management level than Larson—and was *his* supervisor at the time the promotion took place.[2]

Larson also claims that Holder was improperly retained in place of him. Holder and Larson shared similar job duties and appear to have been friends. Larson claims that he and Holder very candidly discussed the results of the performance reviews. According to Larson, they each compiled their individual

Page 10

scores, as reported by Sprague, and determined that Larson's aggregate score was one point higher than Holder's. But Larson was furloughed after being told that his score was the lowest of the remaining managers.

The only evidence supporting this conversation is Larson's own assertions about the conversation—which, as mentioned above, are inadmissible hearsay. Larson has not provided any evidence to support this disputed point, other than his own testimony. Although Holder was deposed, the record is unclear what her versions of the events were. *See* App. at 509 (UAL counsel telling the district court "that is simply a statement that Ms. Holder doesn't back up").

In addition, the documentation produced by UAL undercuts Larson's version of events. *See id.* at 347-353. The record shows two evaluations for both Larson and Holder. Larson's aggregate scores are 13 and 13, while Holder's scores are 14 and 15. UAL explains that the two forms are the result of a switch in reporting methodology during the relevant

time period. Instead of a system where certain factors were averaged and then summed, UAL moved to a system whereby all of the factors were merely summed, changing the scoring range from 4-20 to 2-22. The substance of both employee reviews remained the same—under either metric, Larson received a lower score than Holder. And as we pointed out above, Larson's unsupported allegation of his conversation with Holder is not admissible to rebut this evidence.

Page 11

Next, Larson argues the reduction in force ranking process was so subjective that it allows an inference of pretext. He points to Sprague's testimony concerning how the actual ranking of the Larson-level managers was done prior to the furlough decision. According to Sprague's testimony, the ultimate decision to furlough Larson was a "collective decision," made after the conclusion of an all-day meeting ranking the Larson-level managers in Denver. *Id.* at 270-71. While the actual rankings from that session are not in the record, Sprague described this meeting as merely a "consistency session," where management met for the purpose of determining whether there were any mid-year review scores that were outliers—either too high or too low. *Id.* at 270. There is nothing in the record to indicate that the performance review scores of Larson or anyone else were changed as a result of this meeting.

Thus, we conclude that Larson has failed to meet his burden of making out a prima facie case of sex discrimination. Additionally, the record demonstrates that UAL had a legitimate, non-discriminatory reason for the adverse action— Larson's poor showing on the mid-year reviews.

And even if Larson had made out a prima facie case, he would then need to demonstrate that his furlough was merely a pretext for discrimination. In the context of a RIF, a plaintiff can demonstrate pretext by presenting evidence that (1) his own termination does not accord with the RIF criteria; (2) the RIF criteria were deliberately falsified or manipulated in order to terminate him; or (3) the

Page 12

RIF was generally pretextual. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1193 (10th Cir. 2006). Larson does not argue that the RIF was generally pretextual, but instead urges that the criteria were applied in an uneven manner or with the predetermined goal of furloughing him. In essence, Larson believes that the RIF criteria that were *actually* used have never been disclosed to the court and the process was held in a secret and subjective manner.

But it is clear from the record that Larson had the lowest score of the managers in Denver and was furloughed on that basis. The rest of Larson's arguments are pure conjecture and cannot overcome the conclusion that UAL was exercising its proper business judgment. *See id.* at 1197 (finding that "an employer may cho[o]se to conduct its RIF according to its preferred criteria of performance, and we will not disturb that exercise of defendant's business judgment") (internal quotation omitted).

In sum, even if Larson did demonstrate a prime facie case of discrimination, UAL had a valid, non-pretextual reason for furloughing him. The district court properly granted summary judgment on the Title VII discrimination claim.

B. Title VII Retaliation

Larson also claims he suffered Title VII retaliation because of his complaints to management about the disparaging letters.

Page 13

To make a prima facie showing of retaliation, Larson must point to evidence that (1) he engaged in protected opposition to discrimination; (2) he suffered an adverse employment action; and (3) there was a causal nexus between his protected activity and the adverse action. *See Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1265 (10th Cir. 2009). If this prima facie case is made, then UAL "has the burden of coming forth with a legitimate, nondiscriminatory reason for adverse action." *Id.* (citation omitted).

Since Title VII does not protect against sexual orientation discrimination, "[o]pposition to an employer's conduct is protected [by Title VII's retaliation provision] only if it is opposition to a practice made an unlawful employment practice by Title VII." *Petersen v. Utah Dep't of Corr.*, 301 F.3d 1182, 1188 (10th Cir. 2002) (internal quotations omitted). The two letters discussed above, and Larson's responses to both, form the only basis for Larson's suit. Both letters referred to discrimination on the basis of sexual orientation, not sex discrimination.

Neither letter supports a retaliation claim. The first is clearly derogatory, but UAL initiated an investigation into the letter and issued its own strongly worded response condemning it. Larson admitted that UAL's response was appropriate and that he did not think further communication was required. As to the second letter, it is not clear what aspect Larson contends is discriminatory. It

Page 14

does not specifically reference Larson, nor does it make specific complaints about favoritism or hostility based on gender or sexual orientation.

Additionally, even broadly construed, nothing in the record demonstrates a causal link between Larson's complaints and the decision to furlough him. The two people who Larson claims to have complained to—an HR employee and Sprague—lack the requisite retaliatory link between Larson's protected conduct and the adverse action of his furlough. The HR employee was previously furloughed a few months prior to Larson, and Sprague had a non-retaliatory reason to furlough Larson as a result of the mid-year performance reviews. There is simply no link between Larson's protected activities and the decision to furlough him.[3]

Accordingly, the district court properly granted summary judgment on the retaliation claim.

C. Colorado Anti-Discrimination Act

Larson's jurisdiction in this court was premised on his federal claims under Title VII, with his state-law claims allowed under the doctrine of pendant jurisdiction. Typically, a district court may not exercise pendant jurisdiction over a state law claim when the federal claim is insubstantial. *Carey v. Continental*

Page 15

Airlines, Inc., 823 F.2d 1402, 1404 (10th Cir. 1987). But Larson's claims were not necessarily "insubstantial," so as the district court did, we will address the merits of Larson's state law claims. *See also Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990) (finding that even in the absence of any triable federal claims, a district court can exercise jurisdiction "in those cases in which, given the nature and extent of pretrial proceedings, judicial economy, convenience, and fairness would be served").

CADA discrimination and retaliation claims are subject to the same legal standards as Title VII claims. *See Johnson v. Weld County*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010); *Colorado Civil Rights Comm'n v. Big*

O Tires, Inc., 940 P.2d 397, 400 (Colo. 1997). But, importantly, Colorado *does* recognize sexual orientation as a protected status. *See* C.R.S. § 24-34-402(1)(a). For all of the reasons stated above, we deny Larson's challenge under state law with respect to discrimination and retaliation based on sex.

In support of his claim that he was furloughed because of his sexual orientation and in response to his protected activity of participating in gay events, Larson points to a handful of disparaging remarks made by Sprague over many months. Specifically, Larson refers to four instances of crude remarks: (1) Sprague's use of the term "Larson, the fag," in expressing "pride" about the diversity of his team; (2) jokes about a hole in the wall in Sprague's office that could be used for oral sex; (3) unspecified remarks about Larson's former partner

Page 16

with whom Sprague was friends; and (4) comments from another UAL supervisor about Senator Larry Craig's arrest and "the things you do in airport bathrooms." *See* App. at 61, 66, 69-70, 83.

Larson did not complain about these remarks at the time they were made, and only brought them up once the prospect of litigation was on the horizon. He argues that he was made to simply "grin and bear it," during his employment, but that he was upset by these comments at the time they were made. Aplt. Br. at 14 n.3. Larson admitted that only once he lost his job did he "view[] things that had happened in a different light and . . . considered making . . . complaints." App. at 59.

But even if these comments were made, as distasteful as they are, there is no link between them and the decision to furlough Larson. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000) (finding that "[a] plaintiff must demonstrate a nexus exists between the allegedly discriminatory statement and the company's . . . decision, and therefore that [the protected status] actually played a role in the defendant's decisionmaking process and had a determinative influence on the outcome") (internal quotation omitted). Nor does Larson pursue a hostile workplace claim based on the comments. As discussed above, UAL had a legitimate, non-pretextual RIF and applied performance evaluations to determine whether Larson would be furloughed. Larson even stated that he felt that Sprague was "joking" when making these comments and that Sprague was proud to have

Page 17

Larson on his team. App. at 66. Larson also stated that at no time did he feel that Sprague did not want him on the team because he was a man or because of his sexual orientation. *Id.* And, finally, the record shows that at least one gay man was retained of the surviving Larson-level managers.

Accordingly, the district court properly granted summary judgment on these grounds.

D. Colorado Off-Duty Conduct

Colorado law also prohibits employers from terminating an employee "due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours." C.R.S. § 24-34-402.5(1). But dismissal due to one's sexual orientation—even if Larson could prove that is what occurred—is not itself sufficient to state a claim under the statute. *See Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371, 375-76 (Colo. 1997) (finding that a claim must be based on specific conduct, not simply plaintiff's sexual orientation).

Like his CADA claims, Larson's off-duty conduct claims are supported solely by a variety of stray comments and are not

causally linked to the decision to furlough him. Accordingly, the district court properly granted summary judgment on this claim.

Page 18

III. Conclusion

For all of the foregoing reasons, we AFFIRM the district court's grant of summary judgment on all issues.

Entered for the Court,

Timothy M. Tymkovich
Circuit Judge

Notes:

[*] This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

[1] Title VII discrimination is only cognizable on the basis of sex, not sexual orientation. 42 U.S.C. § 2000e-2(a) (listing protected classifications); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (finding that Title VII protections do not extend to harassment due to a person's sexuality). To the extent that Larson attempts to craft an argument that he was furloughed because of his status as a *gay* male, and not simply as a male, he does not present a cognizable claim under federal law. *See, e.g.*, Aplt. Br. at 30 (complaining about his *male* replacement who is "not gay").

[2] Additionally, Larson did not argue below that his transfer to a different management position qualifies as an adverse action, only the subsequent furlough decision. Even if he had, it was clearly a lateral transfer with no reduction in pay, benefits, or responsibilities. *See Sanchez v. Denver Pub. Schools*, 164 F.3d 527, 532 (10th Cir. 1998) (finding that a transfer was not an adverse action when salary remains the same and any differences are "a mere inconvenience or alteration of job responsibilities").

[3] After being notified of the furlough decision, Larson's counsel sent a letter to UAL complaining about discrimination. Larson points to this letter as evidence of retaliatory intent with respect to any future positions at UAL, but the only adverse action in this case is the furlough decision. Given the timing of the letter, there is clearly no nexus between it and the furlough decision.

2006 New Mexico Statutes - Section 28-1-7 — Unlawful discriminatory practice.

28-1-7. Unlawful discriminatory practice.

It is an unlawful discriminatory practice for:

A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity;

B. a labor organization to exclude a person or to expel or otherwise discriminate against any of its members or against any employer or employee because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, physical or mental handicap or serious medical condition;

C. any employer, labor organization or joint apprenticeship committee to refuse to admit or employ any person in any program established to provide an apprenticeship or other training or retraining because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, physical or mental handicap or serious medical condition, or, if the employer has fifty or more

employees, spousal affiliation;

D. any person, employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, to use any form of application for employment or membership or to make any inquiry regarding prospective membership or employment that expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin, ancestry, sex, sexual orientation, gender identity, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation, unless based on a bona fide occupational qualification;

E. an employment agency to refuse to list and properly classify for employment or refer a person for employment in a known available job, for which the person is otherwise qualified, because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, physical or mental handicap or serious medical condition, unless based on a bona fide occupational qualification, or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on the basis of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation, physical or mental handicap or serious medical condition, unless based on a bona fide occupational qualification;

F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

G. any person to:

(1) refuse to sell, rent, assign, lease or sublease or offer for sale, rental, lease, assignment or sublease any housing accommodation or real property to any person or to refuse to negotiate for the sale, rental, lease, assignment or sublease of any

housing accommodation or real property to any person because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

(2) discriminate against any person in the terms, conditions or privileges of the sale, rental, assignment, lease or sublease of any housing accommodation or real property or in the provision of facilities or services in connection therewith because of race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation; or

(3) print, circulate, display or mail or cause to be printed, circulated, displayed or mailed any statement, advertisement, publication or sign or use any form of application for the purchase, rental, lease, assignment or sublease of any housing accommodation or real property or to make any record or inquiry regarding the prospective purchase, rental, lease, assignment or sublease of any housing accommodation or real property that expresses any preference, limitation or discrimination as to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap, provided that the physical or mental handicap is unrelated to a person's ability to acquire or rent and maintain particular real property or housing accommodation;

H. any person to whom application is made either for financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or real property or for any type of consumer credit, including financial assistance for the acquisition of any consumer good as defined by Section 55-9-102 NMSA 1978, to:

(1) consider the race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap of any individual in the granting, withholding, extending, modifying or renewing or in the fixing of the rates, terms, conditions or provisions of any financial assistance or in the extension of services in connection with the request for financial assistance; or

(2) use any form of application for financial assistance or to make any record or inquiry in connection with applications for financial assistance that expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin, ancestry, sex, sexual orientation, gender identity, spousal affiliation or physical or mental handicap;

I. any person or employer to:

(1) aid, abet, incite, compel or coerce the doing of any unlawful discriminatory practice or to attempt to do so;

(2) engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act [28-1-1 NMSA 1978]; or

(3) willfully obstruct or prevent any person from complying with the provisions of the Human Rights Act or to resist, prevent, impede or interfere with the commission or any of its members, staff or representatives in the performance of their duties under the Human Rights Act; or

J. any employer to refuse or fail to accommodate a person's physical or mental handicap or serious medical condition, unless such accommodation is unreasonable or an undue hardship.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DIGITAL REALTY TRUST, INC. *v.* SOMERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16–1276. Argued November 28, 2017—Decided February 21, 2018

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley) and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Sarbanes-Oxley applies to all "employees" who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U. S. C. §1514A(a)(1). Dodd-Frank defines a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." 15 U. S. C. §78u–6(a)(6). A whistleblower so defined is eligible for an award if original information provided to the SEC leads to a successful enforcement action. §78u–6(b)–(g). And he or she is protected from retaliation in three situations, see §78u–6(h)(1)(A)(i)–(iii), including for "making disclosures that are required or protected under" Sarbanes-Oxley or other specified laws, §78u–6(h)(1)(A)(iii). Sarbanes-Oxley's anti-retaliation provision contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. §1514A(b)(1)(A), (2)(D), whereas Dodd-Frank permits a whistleblower to sue an employer directly in federal district court, with a default six-year limitation period, see §78u–6(h)(1)(B)(i), (iii)(I)(aa).

The SEC's regulations implementing the Dodd-Frank provision contain two discrete whistleblower definitions. For purposes of the award program, Rule 21F–2 requires a whistleblower to "provide the Commission with information" relating to possible securities-law violations. 17 CFR §240.21F–2(a)(1). For purposes of the anti-retaliation protections, however, the Rule does not require SEC re-

Syllabus

porting. See §240.21F–2(b)(1)(i)–(ii).

Respondent Paul Somers alleges that petitioner Digital Realty Trust, Inc. (Digital Realty) terminated his employment shortly after he reported to senior management suspected securities-law violations by the company. Somers filed suit, alleging, *inter alia*, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim on the ground that Somers was not a whistleblower under §78u–6(h) because he did not alert the SEC prior to his termination. The District Court denied the motion, and the Ninth Circuit affirmed. The Court of Appeals concluded that §78u–6(h) does not necessitate recourse to the SEC prior to gaining "whistleblower" status, and it accorded deference to the SEC's regulation under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837.

Held: Dodd-Frank's anti-retaliation provision does not extend to an individual, like Somers, who has not reported a violation of the securities laws to the SEC. Pp. 9–19.

(a) A statute's explicit definition must be followed, even if it varies from a term's ordinary meaning. *Burgess* v. *United States*, 553 U. S. 124, 130. Section 78u–6(a) instructs that the statute's definition of "whistleblower" "shall apply" "[i]n this section," that is, throughout §78u–6. The Court must therefore interpret the term "whistleblower" in §78u–6(h), the anti-retaliation provision, in accordance with that definition.

The whistleblower definition operates in conjunction with the three clauses of §78u–6(h)(1)(A) to spell out the provision's scope. The definition first describes *who* is eligible for protection—namely, a "whistleblower" who provides pertinent information "to the Commission." §78u–6(a)(6). The three clauses then describe what *conduct*, when engaged in by a "whistleblower," is shielded from employment discrimination. An individual who meets both measures may invoke Dodd-Frank's protections. But an individual who falls outside the protected category of "whistleblowers" is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages. This reading is reinforced by another whistleblower-protection provision in Dodd-Frank, see 12 U. S. C. §5567(b), which imposes no requirement that information be conveyed to a government agency. Pp. 9–11.

(b) The Court's understanding is corroborated by Dodd-Frank's purpose and design. The core objective of Dodd-Frank's whistleblower program is to aid the Commission's enforcement efforts by "motivat[ing] people who know of securities law violations to *tell the SEC*." S. Rep. No. 111–176, p. 38 (emphasis added). To that end, Congress provided monetary awards to whistleblowers who furnish actionable

information to the Commission. Congress also complemented the financial incentives for SEC reporting by heightening protection against retaliation. Pp. 11–12.

(c) Somers and the Solicitor General contend that Dodd-Frank's "whistleblower" definition applies only to the statute's award program and not, as the definition plainly states, to its anti-retaliation provision. Their concerns do not support a departure from the statutory text. Pp. 12–18.

(1) They claim that the Court's reading would vitiate the protections of clause (iii) for whistleblowers who make disclosures to persons and entities other than the SEC. See §78u–6(h)(1)(A)(iii). But the plain-text reading of the statute leaves the third clause with substantial meaning by protecting a whistleblower who reports misconduct *both* to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. Pp. 13–15.

(2) Nor would the Court's reading jettison protections for auditors, attorneys, and other employees who are required to report information within the company before making external disclosures. Such employees would be shielded *as soon as they also provide relevant information to the Commission*. And Congress may well have considered adequate the safeguards already afforded to such employees by Sarbanes-Oxley. Pp. 15–16.

(3) Applying the "whistleblower" definition as written, Somers and the Solicitor General further protest, will allow "identical misconduct" to "go punished or not based on the happenstance of a separate report" to the SEC. Brief for Respondent 37–38. But it is understandable that the statute's retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve by reporting information about unlawful activity to the SEC. P. 16.

(4) The Solicitor General observes that the statute contains no apparent requirement of a "temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." Brief for United States as *Amicus Curiae* 25. The Court need not dwell on related hypotheticals, which veer far from the case at hand. Pp. 16–18.

(5) Finally, the interpretation adopted here would not undermine clause (ii) of §78u–6(h)(1)(A), which prohibits retaliation against a whistleblower for "initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information conveyed to the SEC by a whistleblower in accordance with the statute. The statute delegates authority to the Commission to establish the "manner" in which a whistleblower may provide information to the SEC. §78u–6(a)(6). Nothing prevents the Commission from enumer-

Syllabus

ating additional means of SEC reporting, including through testimony protected by clause (ii). P. 18.

(d) Because "Congress has directly spoken to the precise question at issue," *Chevron*, 467 U. S., at 842, deference is not accorded to the contrary view advanced by the SEC in Rule 21F–2. Pp. 18–19.

850 F. 3d 1045, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SOTOMAYOR, J., filed a concurring opinion, in which BREYER, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which ALITO and GORSUCH, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 16–1276

DIGITAL REALTY TRUST, INC., PETITIONER v. PAUL SOMERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 21, 2018]

JUSTICE GINSBURG delivered the opinion of the Court.

Endeavoring to root out corporate fraud, Congress passed the Sarbanes-Oxley Act of 2002, 116 Stat. 745 (Sarbanes-Oxley), and the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 1376 (Dodd-Frank). Both Acts shield whistleblowers from retaliation, but they differ in important respects. Most notably, Sarbanes-Oxley applies to all "employees" who report misconduct to the Securities and Exchange Commission (SEC or Commission), any other federal agency, Congress, or an internal supervisor. 18 U. S. C. §1514A(a)(1). Dodd-Frank delineates a more circumscribed class; it defines "whistleblower" to mean a person who provides "information relating to a violation of the securities laws to the Commission." 15 U. S. C. §78u–6(a)(6). A whistleblower so defined is eligible for an award if original information he or she provides to the SEC leads to a successful enforcement action. §78u–6(b)–(g). And, most relevant here, a whistleblower is protected from retaliation for, inter alia, "making disclosures that are required or protected under" Sarbanes-Oxley, the Securi-

ties Exchange Act of 1934, the criminal anti-retaliation proscription at 18 U. S. C. §1513(e), or any other law subject to the SEC's jurisdiction. 15 U. S. C. §78u–6(h)(1)(A)(iii).

The question presented: Does the anti-retaliation provision of Dodd-Frank extend to an individual who has not reported a violation of the securities laws to the SEC and therefore falls outside the Act's definition of "whistleblower"? Pet. for Cert. (I). We answer that question "No": To sue under Dodd-Frank's anti-retaliation provision, a person must first "provid[e] . . . information relating to a violation of the securities laws to the Commission." §78u–6(a)(6).

I

A

"To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation," Congress enacted Sarbanes-Oxley in 2002. Lawson v. FMR LLC, 571 U. S. 429, ___ (2014) (slip op., at 1). Most pertinent here, Sarbanes-Oxley created new protections for employees at risk of retaliation for reporting corporate misconduct. See 18 U. S. C. §1514A. Section 1514A prohibits certain companies from discharging or otherwise "discriminat[ing] against an employee in the terms and conditions of employment because" the employee "provid[es] information . . . or otherwise assist[s] in an investigation regarding any conduct which the employee reasonably believes constitutes a violation" of certain criminal fraud statutes, any SEC rule or regulation, or "any provision of Federal law relating to fraud against shareholders." §1514A(a)(1). An employee qualifies for protection when he or she provides information or assistance either to a federal regulatory or law enforcement agency, Congress, or any "person with supervisory author-

ity over the employee." §1514A(a)(1)(A)–(C).[1]

To recover under §1514A, an aggrieved employee must exhaust administrative remedies by "filing a complaint with the Secretary of Labor." §1514A(b)(1)(A); see Lawson, 571 U. S., at ____–____ (slip op., at 5–6). Congress prescribed a 180-day limitation period for filing such a complaint. §1514A(b)(2)(D). If the agency "does not issue a final decision within 180 days of the filing of [a] complaint, and the [agency's] delay is not due to bad faith on the claimant's part, the claimant may proceed to federal district court for de novo review." Id., at ____ (slip op., at 6) (citing §1514A(b)). An employee who prevails in a proceeding under §1514A is "entitled to all relief necessary to make the employee whole," including reinstatement, backpay with interest, and any "special damages sustained as a result of the discrimination," among such damages, litigation costs. §1514A(c).

B

1

At issue in this case is the Dodd-Frank anti-retaliation provision enacted in 2010, eight years after the enactment of Sarbanes-Oxley. Passed in the wake of the 2008 financial crisis, Dodd-Frank aimed to "promote the financial stability of the United States by improving accountability and transparency in the financial system." 124 Stat. 1376.

Dodd-Frank responded to numerous perceived shortcomings in financial regulation. Among them was the SEC's need for additional "power, assistance and money at its disposal" to regulate securities markets. S. Rep. No. 111–176, pp. 36, 37 (2010). To assist the Commission "in

[1] Sarbanes-Oxley also prohibits retaliation against an "employee" who "file[s], . . . testifi[ies], participate[s] in, or otherwise assist[s] in a proceeding filed or about to be filed . . . relating to an alleged violation of" the same provisions of federal law addressed in 18 U. S. C. §1514A(a)(1). See §1514A(a)(2).

identifying securities law violations," the Act established "a new, robust whistleblower program designed to motivate people who know of securities law violations to tell the SEC." Id., at 38. And recognizing that "whistleblowers often face the difficult choice between telling the truth and . . . committing 'career suicide,'" Congress sought to protect whistleblowers from employment discrimination. Id., at 111, 112.

Dodd-Frank implemented these goals by adding a new provision to the Securities Exchange Act of 1934: 15 U. S. C. §78u–6. Section 78u–6 begins by defining a "whistleblower" as "any individual who provides . . . information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission." §78u–6(a)(6) (emphasis added). That definition, the statute directs, "shall apply" "[i]n this section"—i.e., throughout §78u–6. §78u–6(a).

Section 78u–6 affords covered whistleblowers both incentives and protection. First, the section creates an award program for "whistleblowers who voluntarily provid[e] original information to the Commission that le[ads] to the successful enforcement of [a] covered judicial or administrative action." §78u–6(b)(1). A qualifying whistleblower is entitled to a cash award of 10 to 30 percent of the monetary sanctions collected in the enforcement action. See §78u–6(b)(1)(A)–(B).

Second, §78u–6(h) prohibits an employer from discharging, harassing, or otherwise discriminating against a "whistleblower" "because of any lawful act done by the whistleblower" in three situations: first, "in providing information to the Commission in accordance with [§78u–6]," §78u–6(h)(1)(A)(i); second, "in initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information provided to the SEC in accordance with §78u–6, §78u–6(h)(1)(A)(ii); and third, "in making disclosures that are required or protected under"

either Sarbanes-Oxley, the Securities Exchange Act of 1934, the criminal anti-retaliation prohibition at 18 U. S. C. §1513(e),[2] or "any other law, rule, or regulation subject to the jurisdiction of the Commission," §78u–6(h)(1)(A)(iii). Clause (iii), by cross-referencing Sarbanes-Oxley and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC. For example, the clause shields an employee's reports of wrongdoing to an internal supervisor if the reports are independently safeguarded from retaliation under Sarbanes-Oxley. See supra, at 2–3.[3]

The recovery procedures under the anti-retaliation provisions of Dodd-Frank and Sarbanes-Oxley differ in critical respects. First, unlike Sarbanes-Oxley, which contains an administrative-exhaustion requirement and a 180-day administrative complaint-filing deadline, see 18 U. S. C. §1514A(b)(1)(A), (2)(D), Dodd-Frank permits a whistleblower to sue a current or former employer directly

[2] Section 1513(e) provides: "Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both."

[3] Section 78u–6(h)(1)(A) reads in full:

"No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

"(i) in providing information to the Commission in accordance with this section;

"(ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or

"(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U. S. C. §7201 et seq.), this chapter, including section 78j–1(m) of this title, section 1513(e) of title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission."

in federal district court, with a default limitation period of six years, see §78u–6(h)(1)(B)(i), (iii)(I)(aa). Second, Dodd-Frank instructs a court to award to a prevailing plaintiff double backpay with interest, see §78u–6(h)(1)(C)(ii), while Sarbanes-Oxley limits recovery to actual backpay with interest, see 18 U. S. C. §1514A(c)(2)(B). Like Sarbanes-Oxley, however, Dodd-Frank authorizes reinstatement and compensation for litigation costs, expert witness fees, and reasonable attorneys' fees. Compare §78u–6(h)(1)(C)(i), (iii), with 18 U. S. C. §1514A(c)(2)(A), (C).[4]

2

Congress authorized the SEC "to issue such rules and regulations as may be necessary or appropriate to implement the provisions of [§78u–6] consistent with the purposes of this section." §78u–6(j). Pursuant to this authority, the SEC published a notice of proposed rulemaking to "Implemen[t] the Whistleblower Provisions" of Dodd-Frank. 75 Fed. Reg. 70488 (2010). Proposed Rule 21F–2(a) defined a "whistleblower," for purposes of both the award and anti-retaliation provisions of §78u–6, as one or more individuals who "provide the Commission with information relating to a potential violation of the securities laws." Id., at 70519 (proposed 17 CFR §240.21F–2(a)). The proposed rule, the agency noted, "tracks the statutory definition of a 'whistleblower'" by requiring information reporting to the SEC itself. 75 Fed. Reg. 70489.

In promulgating the final Rule, however, the agency changed course. Rule 21F–2, in finished form, contains two discrete "whistleblower" definitions. See 17 CFR §240.21F–2(a)–(b) (2017). For purposes of the award program, the Rule states that "[y]ou are a whistleblower if

[4]Unlike Dodd-Frank, Sarbanes-Oxley explicitly entitles a prevailing employee to "all relief necessary to make the employee whole," including "compensation for any special damages sustained as a result of the discrimination." 18 U. S. C. §1514A(c)(1), (2)(C).

. . . you provide the Commission with information . . . relat[ing] to a possible violation of the Federal securities laws." §240.21F–2(a)(1) (emphasis added). The information must be provided to the SEC through its website or by mailing or faxing a specified form to the SEC Office of the Whistleblower. See ibid.; §240.21F–9(a)(1)–(2).

"For purposes of the anti-retaliation protections," however, the Rule states that "[y]ou are a whistleblower if . . . [y]ou possess a reasonable belief that the information you are providing relates to a possible securities law violation" and "[y]ou provide that information in a manner described in" clauses (i) through (iii) of §78u–6(h)(1)(A). 17 CFR §240.21F–2(b)(1)(i)–(ii). "The anti-retaliation protections apply," the Rule emphasizes, "whether or not you satisfy the requirements, procedures and conditions to qualify for an award." §240.21F–2(b)(1)(iii). An individual may therefore gain anti-retaliation protection as a "whistleblower" under Rule 21F–2 without providing information to the SEC, so long as he or she provides information in a manner shielded by one of the anti-retaliation provision's three clauses. For example, a report to a company supervisor would qualify if the report garners protection under the Sarbanes-Oxley anti-retaliation provision.[5]

C

Petitioner Digital Realty Trust, Inc. (Digital Realty) is a real estate investment trust that owns, acquires, and develops data centers. See Brief for Petitioner 3. Digital Realty employed respondent Paul Somers as a Vice President from 2010 to 2014. See 119 F. Supp. 3d 1088, 1092 (ND Cal. 2015). Somers alleges that Digital Realty terminated him shortly after he reported to senior management suspected securities-law violations by the company. See

[5] In 2015, the SEC issued an interpretive rule reiterating that anti-retaliation protection is not contingent on a whistleblower's provision of information to the Commission. See 80 Fed. Reg. 47829 (2015).

ibid. Although nothing impeded him from alerting the SEC prior to his termination, he did not do so. See Tr. of Oral Arg. 45. Nor did he file an administrative complaint within 180 days of his termination, rendering him ineligible for relief under Sarbanes-Oxley. See ibid.; 18 U. S. C. §1514A(b)(2)(D).

Somers brought suit in the United States District Court for the Northern District of California alleging, inter alia, a claim of whistleblower retaliation under Dodd-Frank. Digital Realty moved to dismiss that claim, arguing that "Somers does not qualify as a 'whistleblower' under [§78u–6(h)] because he did not report any alleged law violations to the SEC." 119 F. Supp. 3d, at 1094. The District Court denied the motion. Rule 21F–2, the court observed, does not necessitate recourse to the SEC prior to gaining "whistleblower" status under Dodd-Frank. See id., at 1095–1096. Finding the statutory scheme ambiguous, the court accorded deference to the SEC's Rule under Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984). See 119 F. Supp. 3d, at 1096–1106.

On interlocutory appeal, a divided panel of the Court of Appeals for the Ninth Circuit affirmed. 850 F. 3d 1045 (2017). The majority acknowledged that Dodd-Frank's definitional provision describes a "whistleblower" as an individual who provides information to the SEC itself. Id., at 1049. But applying that definition to the anti-retaliation provision, the majority reasoned, would narrow the third clause of §78u–6(h)(1)(A) "to the point of absurdity": The statute would protect employees only if they "reported possible securities violations both internally and to the SEC." Ibid. Such dual reporting, the majority believed, was unlikely to occur. Ibid. Therefore, the majority concluded, the statute should be read to protect employees who make disclosures privileged by clause (iii) of §78u–6(h)(1)(A), whether or not those employees also provide information to the SEC. Id., at 1050. In any

event, the majority held, the SEC's resolution of any statutory ambiguity warranted deference. Ibid. Judge Owens dissented. In his view, the statutory definition of whistleblower was clear, left no room for interpretation, and plainly governed. Id., at 1051.

Two other Courts of Appeals have weighed in on the question before us. The Court of Appeals for the Fifth Circuit has held that employees must provide information to the SEC to avail themselves of Dodd-Frank's anti-retaliation safeguard. See Asadi v. G. E. Energy (USA), L. L. C., 720 F. 3d 620, 630 (2013). A divided panel of the Court of Appeals for the Second Circuit reached the opposite conclusion, over a dissent by Judge Jacobs. See Berman v. NEO@OGILVY LLC, 801 F. 3d 145, 155 (2013). We granted certiorari to resolve this conflict, 582 U. S. ____ (2017), and now reverse the Ninth Circuit's judgment.

II

"When a statute includes an explicit definition, we must follow that definition," even if it varies from a term's ordinary meaning. Burgess v. United States, 553 U. S. 124, 130 (2008) (internal quotation marks omitted). This principle resolves the question before us.

A

Our charge in this review proceeding is to determine the meaning of "whistleblower" in §78u–6(h), Dodd-Frank's anti-retaliation provision. The definition section of the statute supplies an unequivocal answer: A "whistleblower" is "any individual who provides . . . information relating to a violation of the securities laws to the Commission." §78u–6(a)(6) (emphasis added). Leaving no doubt as to the definition's reach, the statute instructs that the "definitio[n] shall apply" "[i]n this section," that is, throughout §78u–6. §78u–6(a)(6).

The whistleblower definition operates in conjunction

with the three clauses of §78u–6(h)(1)(A) to spell out the provision's scope. The definition first describes who is eligible for protection—namely, a whistleblower who provides pertinent information "to the Commission." §78u–6(a)(6). The three clauses of §78u–6(h)(1)(A) then describe what conduct, when engaged in by a whistleblower, is shielded from employment discrimination. See §78u–6(h)(1)(A)(i)–(iii). An individual who meets both measures may invoke Dodd-Frank's protections. But an individual who falls outside the protected category of "whistleblowers" is ineligible to seek redress under the statute, regardless of the conduct in which that individual engages.

Reinforcing our reading, another whistleblower-protection provision in Dodd-Frank imposes no requirement that information be conveyed to a government agency. Title 10 of the statute, which created the Consumer Financial Protection Bureau (CFPB), prohibits discrimination against a "covered employee" who, among other things, "provide[s] . . . information to [his or her] employer, the Bureau, or any other State, local, or Federal, government authority or law enforcement agency relating to" a violation of a law subject to the CFPB's jurisdiction. 12 U. S. C. §5567(a)(1). To qualify as a "covered employee," an individual need not provide information to the CFPB, or any other entity. See §5567(b) ("covered employee" means "any individual performing tasks related to the offering or provision of a consumer financial product or service").

"[W]hen Congress includes particular language in one section of a statute but omits it in another[,] . . . this Court presumes that Congress intended a difference in meaning." Loughrin v. United States, 573 U. S. ___, ___ (2014) (slip op., at 6) (internal quotation marks and alteration omitted). Congress placed a government-reporting requirement in §78u–6(h), but not elsewhere in the same

statute. Courts are not at liberty to dispense with the condition—tell the SEC—Congress imposed.

B

Dodd-Frank's purpose and design corroborate our comprehension of §78u–6(h)'s reporting requirement. The "core objective" of Dodd-Frank's robust whistleblower program, as Somers acknowledges, Tr. of Oral Arg. 45, is "to motivate people who know of securities law violations to tell the SEC," S. Rep. No. 111–176, at 38 (emphasis added). By enlisting whistleblowers to "assist the Government [in] identify[ing] and prosecut[ing] persons who have violated securities laws," Congress undertook to improve SEC enforcement and facilitate the Commission's "recover[y] [of] money for victims of financial fraud." Id., at 110. To that end, §78u–6 provides substantial monetary rewards to whistleblowers who furnish actionable information to the SEC. See §78u–6(b).

Financial inducements alone, Congress recognized, may be insufficient to encourage certain employees, fearful of employer retaliation, to come forward with evidence of wrongdoing. Congress therefore complemented the Dodd-Frank monetary incentives for SEC reporting by heightening protection against retaliation. While Sarbanes-Oxley contains an administrative-exhaustion requirement, a 180-day administrative complaint-filing deadline, and a remedial scheme limited to actual damages, Dodd-Frank provides for immediate access to federal court, a generous statute of limitations (at least six years), and the opportunity to recover double backpay. See supra, at 5–6. Dodd-Frank's award program and anti-retaliation provision thus work synchronously to motivate individuals with knowledge of illegal activity to "tell the SEC." S. Rep. No. 111–176, at 38.

When enacting Sarbanes-Oxley's whistleblower regime, in comparison, Congress had a more far-reaching objec-

tive: It sought to disturb the "corporate code of silence" that "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." Lawson, 571 U. S., at ___ (slip op., at 4) (internal quotation marks omitted). Accordingly, the Sarbanes-Oxley anti-retaliation provision covers employees who report fraud not only to the SEC, but also to any other federal agency, Congress, or an internal supervisor. See 18 U. S. C. §1514A(a)(1).

C

In sum, Dodd-Frank's text and purpose leave no doubt that the term "whistleblower" in §78u–6(h) carries the meaning set forth in the section's definitional provision. The disposition of this case is therefore evident: Somers did not provide information "to the Commission" before his termination, §78u–6(a)(6), so he did not qualify as a "whistleblower" at the time of the alleged retaliation. He is therefore ineligible to seek relief under §78u–6(h).

III

Somers and the Solicitor General tender a different view of Dodd-Frank's compass. The whistleblower definition, as they see it, applies only to the statute's award program, not to its anti-retaliation provision, and thus not, as the definition plainly states, throughout "this section," §78u–6(a). See Brief for Respondent 30; Brief for United States as Amicus Curiae 10–11. For purposes of the anti-retaliation provision alone, they urge us to construe the term "whistleblower" in its "ordinary sense," i.e., without any SEC-reporting requirement. Brief for Respondent 18.

Doing so, Somers and the Solicitor General contend, would align with our precedent, specifically Lawson v. Suwannee Fruit & S. S. Co., 336 U. S. 198 (1949), and Utility Air Regulatory Group v. EPA, 573 U. S. ___ (2014). In those decisions, we declined to apply a statutory defini-

tion that ostensibly governed where doing so would have been "incompatible with . . . Congress' regulatory scheme," id., at ___ (slip op., at 18) (internal quotation marks omitted), or would have "destroy[ed] one of the [statute's] major purposes," Suwannee Fruit, 336 U. S., at 201.

This case is of a piece, Somers and the Solicitor General maintain. Applying the statutory definition here, they variously charge, would "create obvious incongruities," Brief for United States as Amicus Curiae 19 (internal quotation marks omitted), "produce anomalous results," id., at 22, "vitiate much of the [statute's] protection," id., at 20 (internal quotation marks omitted), and, as the Court of Appeals put it, narrow clause (iii) of §78u–6(h)(1)(A) "to the point of absurdity," Brief for Respondent 35 (quoting 850 F. 3d, at 1049). We next address these concerns and explain why they do not lead us to depart from the statutory text.

A

It would gut "much of the protection afforded by" the third clause of §78u–6(h)(1)(a), Somers and the Solicitor General urge most strenuously, to apply the whistleblower definition to the anti-retaliation provision. Brief for United States as Amicus Curiae 20 (internal quotation marks omitted); Brief for Respondent 28–29. As earlier noted, see supra, at 4–5, clause (iii) prohibits retaliation against a "whistleblower" for "making disclosures" to various persons and entities, including but not limited to the SEC, to the extent those disclosures are "required or protected under" various laws other than Dodd-Frank. §78u–6(h)(1)(A)(iii). Applying the statutory definition of whistleblower, however, would limit clause (iii)'s protection to "only those individuals who report to the Commission." Brief for United States as Amicus Curiae 22.

The plain-text reading of the statute undoubtedly shields fewer individuals from retaliation than the alter-

native proffered by Somers and the Solicitor General. But we do not agree that this consequence "vitiate[s]" clause (iii)'s protection, id., at 20 (internal quotation marks omitted), or ranks as "absur[d]," Brief for Respondent 35 (internal quotation marks omitted).[6] In fact, our reading leaves the third clause with "substantial meaning." Brief for Petitioner 32.

With the statutory definition incorporated, clause (iii) protects a whistleblower who reports misconduct both to the SEC and to another entity, but suffers retaliation because of the latter, non-SEC, disclosure. That would be so, for example, where the retaliating employer is unaware that the employee has alerted the SEC. In such a case, without clause (iii), retaliation for internal reporting would not be reached by Dodd-Frank, for clause (i) applies only where the employer retaliates against the employee "because of" the SEC reporting. §78u–6(h)(1)(A). Moreover, even where the employer knows of the SEC reporting, the third clause may operate to dispel a proof problem: The employee can recover under the statute without having to demonstrate whether the retaliation was motivated by the internal report (thus yielding protection under clause (iii)) or by the SEC disclosure (thus gaining protection under clause (i)).

While the Solicitor General asserts that limiting the protections of clause (iii) to dual reporters would "shrink to insignificance the [clause's] ban on retaliation," Brief for United States as Amicus Curiae 22 (internal quotation marks omitted), he offers scant evidence to support that assertion. Tugging in the opposite direction, he reports that approximately 80 percent of the whistleblowers who received awards in 2016 "reported internally before report-

[6]The Solicitor General, unlike Somers, acknowledges that it would not be absurd to apply the "whistleblower" definition to the anti-retaliation provision. Tr. of Oral Arg. 52.

ing to the Commission." Id., at 23. And Digital Realty cites real-world examples of dual reporters seeking Dodd-Frank or Sarbanes-Oxley recovery for alleged retaliation. See Brief for Petitioner 33, and n. 4 (collecting cases). Overlooked by Somers and the Solicitor General, in dual-reporting cases, retaliation not prompted by SEC disclosures (and thus unaddressed by clause (i)) is likely commonplace: The SEC is required to protect the identity of whistleblowers, see §78u–6(h)(2)(A), so employers will often be unaware that an employee has reported to the Commission. In any event, even if the number of individuals qualifying for protection under clause (iii) is relatively limited, "[i]t is our function to give the statute the effect its language suggests, however modest that may be." Morrison v. National Australia Bank Ltd., 561 U. S. 247, 270 (2010).

B

Somers and the Solicitor General express concern that our reading would jettison protection for auditors, attorneys, and other employees subject to internal-reporting requirements. See Brief for Respondent 35; Brief for United States as Amicus Curiae 21. Sarbanes-Oxley, for example, requires auditors and attorneys to report certain information within the company before making disclosures externally. See 15 U. S. C. §§78j–1(b), 7245; 17 CFR §205.3. If the whistleblower definition applies, Somers and the Solicitor General fear, these professionals will be "le[ft] . . . vulnerable to discharge or other retaliatory action for complying with" their internal-reporting obligations. Brief for United States as Amicus Curiae 22 (internal quotation marks omitted).

Our reading shields employees in these circumstances, however, as soon as they also provide relevant information to the Commission. True, such employees will remain ineligible for Dodd-Frank's protection until they tell the

SEC, but this result is consistent with Congress' aim to encourage SEC disclosures. See S. Rep. No. 111–176, at 38; supra, at 3–4, 11. Somers worries that lawyers and auditors will face retaliation quickly, before they have a chance to report to the SEC. Brief for Respondent 35–36. But he offers nothing to show that Congress had this concern in mind when it enacted §78u–6(h). Indeed, Congress may well have considered adequate the safeguards already afforded by Sarbanes-Oxley, protections specifically designed to shield lawyers, accountants, and similar professionals. See Lawson, 571 U. S., at ___ (slip op., at 17).

C

Applying the whistleblower definition as written, Somers and the Solicitor General further protest, will create "an incredibly unusual statutory scheme": "[I]dentical misconduct"—i.e., retaliating against an employee for internal reporting—will "go punished or not based on the happenstance of a separate report" to the SEC, of which the wrongdoer may "not even be aware." Brief for Respondent 37–38. See also Brief for United States as Amicus Curiae 24. The upshot, the Solicitor General warns, "would [be] substantially diminish[ed] Dodd-Fran[k] deterrent effect." Ibid.

Overlooked in this protest is Dodd-Frank's core objective: to prompt reporting to the SEC. Supra, at 3–4, 11. In view of that precise aim, it is understandable that the statute's retaliation protections, like its financial rewards, would be reserved for employees who have done what Dodd-Frank seeks to achieve, i.e., they have placed information about unlawful activity before the Commission to aid its enforcement efforts.

D

Pointing to another purported anomaly attending the

reading we adopt today, the Solicitor General observes that neither the whistleblower definition nor §78u–6(h) contains any requirement of a "temporal or topical connection between the violation reported to the Commission and the internal disclosure for which the employee suffers retaliation." Brief for United States as Amicus Curiae 25. It is therefore possible, the Solicitor General posits, that "an employee who was fired for reporting accounting fraud to his supervisor in 2017 would have a cause of action under [§78u–6(h)] if he had reported an insider-trading violation by his previous employer to the Commission in 2012." Ibid. For its part, Digital Realty agrees that this scenario could arise, but does not see it as a cause for concern: "Congress," it states, "could reasonably have made the policy judgment that individuals who report securities-law violations to the SEC should receive broad protection over time against retaliation for a variety of disclosures." Reply Brief 11.

We need not dwell on the situation hypothesized by the Solicitor General, for it veers far from the case before us. We note, however, that the interpretation offered by Somers and the Solicitor General—i.e., ignoring the statutory definition when construing the anti-retaliation provision—raises an even thornier question about the law's scope. Their view, which would not require an employee to provide information relating to a securities-law violation to the SEC, could afford Dodd-Frank protection to an employee who reports information bearing no relationship whatever to the securities laws. That prospect could be imagined based on the broad array of federal statutes and regulations cross-referenced by clause (iii) of the anti-retaliation provision. E.g., 18 U. S. C. §1513(e) (criminalizing retaliation for "providing to a law enforcement officer any truthful information relating to the commission . . . of any Federal offense" (emphasis added)); see supra, at 5, and n. 2. For example, an employee fired for reporting a

coworker's drug dealing to the Federal Bureau of Investigation might be protected. Brief for Petitioner 38. It would make scant sense, however, to rank an FBI drug-trafficking informant a whistleblower under Dodd-Frank, a law concerned only with encouraging the reporting of "securities law violations." S. Rep. No. 111–176, at 38 (emphasis added).

E

Finally, the interpretation we adopt, the Solicitor General adds, would undermine not just clause (iii) of §78u–6(h)(1)(A), but clause (ii) as well. Clause (ii) prohibits retaliation against a whistleblower for "initiating, testifying in, or assisting in any investigation or . . . action of the Commission based upon" information conveyed to the SEC by a whistleblower in accordance with the statute. §78u–6(h)(1)(A)(ii). If the whistleblower definition is applied to §78u–6(h), the Solicitor General states, "an employer could fire an employee for giving . . . testimony [to the SEC] if the employee had not previously reported to the Commission online or through the specified written form"—i.e., the methods currently prescribed by Rule 21F–9 for a whistleblower to provide information to the Commission. Brief for United States as Amicus Curiae 20–21 (citing 17 CFR §240.21F–9(a)(1)–(2)).

But the statute expressly delegates authority to the SEC to establish the "manner" in which information may be provided to the Commission by a whistleblower. See §78u–6(a)(6). Nothing in today's opinion prevents the agency from enumerating additional means of SEC reporting—including through testimony protected by clause (ii).

IV

For the foregoing reasons, we find the statute's definition of "whistleblower" clear and conclusive. Because "Congress has directly spoken to the precise question at

issue," Chevron, 467 U. S., at 842, we do not accord deference to the contrary view advanced by the SEC in Rule 21F–2. See 17 CFR §240.21F–2(b)(1); supra, at 6–7. The statute's unambiguous whistleblower definition, in short, precludes the Commission from more expansively interpreting that term. See Burgess, 553 U. S., at 130.

* * *

The judgment of the Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 16-1276

DIGITAL REALTY TRUST, INC., PETITIONER v. PAUL SOMERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 21, 2018]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring.

I join the Court's opinion in full. I write separately only to note my disagreement with the suggestion in my colleague's concurrence that a Senate Report is not an appropriate source for this Court to consider when interpreting a statute.

Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law. Just as courts are capable of assessing the reliability and utility of evidence generally, they are capable of assessing the reliability and utility of legislative-history materials.

Committee reports, like the Senate Report the Court discusses here, see ante, at 3–4, 11–12, 16–18, are a particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning. See Garcia v. United States, 469 U. S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation'" (quoting Zuber v. Allen, 396 U. S. 168, 186 (1969))). Bills presented to Congress for consideration are generally accompanied by a committee report. Such re-

ports are typically circulated at least two days before a bill is to be considered on the floor and provide Members of Congress and their staffs with information about "a bill's context, purposes, policy implications, and details," along with information on its supporters and opponents. R. Katzmann, Judging Statutes 20, and n. 62 (2014) (citing A. LaRue, Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, S. Doc. No. 107–1, p. 17 (2001)). These materials "have long been important means of informing the whole chamber about proposed legislation," Katzmann, Judging Statutes, at 19, a point Members themselves have emphasized over the years.* It is thus no surprise that legislative staffers view committee and conference reports as the most reliable type of legislative history. See Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 977 (2013).

Legislative history can be particularly helpful when a

---

*See, e.g., Hearings on the Nomination of Judge Antonin Scalia, To Be Associate Justice of the Supreme Court of the United States before the Senate Committee on the Judiciary, 99th Cong., 2d Sess., 65–66 (1986) (Sen. Charles E. Grassley) ("[A]s one who has served in Congress for 12 years, legislative history is very important to those of us here who want further detailed expression of that legislative intent"); Mikva, Reading and Writing Statutes, 28 S. Tex. L. Rev. 181, 184 (1986) ("The committee report is the bone structure of the legislation. It is the road map that explains why things are in and things are out of the statute"); Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response? 93 Mich. L. Rev. 1, 28 (1994) (compiling the views of former Members on "the central importance of committee reports to their own understanding of statutory text"). In fact, some Members "are more likely to vote . . . based on a reading of the legislative history than on a reading of the statute itself." Gluck & Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation and the Canons: Part I, 65 Stan. L. Rev. 901, 968 (2013).

statute is ambiguous or deals with especially complex matters. But even when, as here, a statute's meaning can clearly be discerned from its text, consulting reliable legislative history can still be useful, as it enables us to corroborate and fortify our understanding of the text. See, e.g., Tapia v. United States, 564 U. S. 319, 331–332 (2011); Carr v. United States, 560 U. S. 438, 457–458 (2010). Moreover, confirming our construction of a statute by considering reliable legislative history shows respect for and promotes comity with a coequal branch of Government. See Katzmann, Judging Statutes, at 35–36.

For these reasons, I do not think it wise for judges to close their eyes to reliable legislative history—and the realities of how Members of Congress create and enact laws—when it is available.

SUPREME COURT OF THE UNITED STATES

No. 16–1276

DIGITAL REALTY TRUST, INC., PETITIONER v. PAUL SOMERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 21, 2018]

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, concurring in part and concurring in the judgment.

I join the Court's opinion only to the extent it relies on the text of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. The question in this case is whether the term "whistleblower" in Dodd-Frank's antiretaliation provision, 15 U. S. C. §78u–6(h)(1), includes a person who does not report information to the Securities and Exchange Commission. The answer is in the definitions section of the statute, which states that the term "whistleblower" means a person who provides "information relating to a violation of the securities laws to the Commission." §78u–6(a)(6). As the Court observes, this statutory definition "resolves the question before us." Ante, at 9. The Court goes on, however, to discuss the supposed "purpose" of the statute, which it primarily derives from a single Senate Report. See ante, at 3–4, 11–12, 16–18. Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd-Frank with the same intent, "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended."* Lawson v.

*For what it is worth, I seriously doubt that a committee report is a

"particularly reliable source" for discerning "Congress' intended meaning." Ante, at 1 (SOTOMAYOR, J., concurring). The following exchange on the Senate floor is telling:

"Mr. ARMSTRONG. Mr. President, will the Senator tell me whether or not he wrote the committee report?

"Mr. DOLE. Did I write the committee report?

"Mr. ARMSTRONG. Yes.

"Mr. DOLE. No; the Senator from Kansas did not write the committee report.

"Mr. ARMSTRONG. Did any Senator write the committee report?

"Mr. DOLE. I have to check.

"Mr. ARMSTRONG. Does the Senator know of any Senator who wrote the committee report?

"Mr. DOLE. I might be able to identify one, but I would have to search. I was here all during the time it was written, I might say, and worked carefully with the staff as they worked. . . .

"Mr. ARMSTRONG. Mr. President, has the Senator from Kansas, the chairman of the Finance Committee, read the committee report in its entirety?

"Mr. DOLE. I am working on it. It is not a bestseller, but I am working on it.

"Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?

"Mr. DOLE. No.

"Mr. ARMSTRONG. . . . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate. . . . If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report. . . . [L]et me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute." Hirschey v. FERC, 777 F. 2d 1, 7–8, n. 1 (CADC 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. 16918–16919 (1982)). See also Kethledge, Ambiguities and Agency Cases: Reflections After (Almost) Ten Years on the Bench, 70 Vand. L. Rev. En Banc 315, 317–318 (2017) (describing his experience as a Senate staffer who drafted legislative history "like being a teenager at home while your parents are away for the weekend: there was no supervision. I was able to write more or less what I pleased. . . . [M]ost members of Congress . . . have no idea at all about what is in the legislative history for a particular bill").

FMR LLC, 571 U. S. 429, ___ (2014) (Scalia, J., concurring in part and concurring in judgment) (slip op., at 1). And "it would be a strange canon of statutory construction that would require Congress to state in committee reports . . . that which is obvious on the face of a statute." Harrison v. PPG Industries, Inc., 446 U. S. 578, 592 (1980). For these reasons, I am unable to join the portions of the Court's opinion that venture beyond the statutory text.

U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

January 25, 2018

MEMORANDUM FOR: HEADS OF CIVIL LITIGATING COMPONENTS
UNITED STATES ATTORNEYS

CC: REGULATORY REFORM TASK FORCE

FROM: THE ASSOCIATE ATTORNEY GENERAL

SUBJECT: Limiting Use of Agency Guidance Documents In Affirmative Civil Enforcement Cases

On November 16, 2017, the Attorney General issued a memorandum ("Guidance Policy") prohibiting Department components from issuing guidance documents that effectively bind the public without undergoing the notice-and-comment rulemaking process. Under the Guidance Policy, the Department may not issue guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments), or to create binding standards by which the Department will determine compliance with existing statutory or regulatory requirements.

The Guidance Policy also prohibits the Department from using its guidance documents to coerce regulated parties into taking any action or refraining from taking any action beyond what is required by the terms of the applicable statute or lawful regulation. And when the Department issues a guidance document setting out voluntary standards, the Guidance Policy requires a clear statement that noncompliance will not in itself result in any enforcement action.

The principles from the Guidance Policy are relevant to more than just the Department's own publication of guidance documents. These principles also should guide Department litigators in determining the legal relevance of other agencies' guidance documents in affirmative civil enforcement ("ACE").[1]

[1] As used in this memorandum, "guidance document" means any agency statement of general applicability and future effect, whether styled as "guidance" or otherwise, that is designed to advise parties outside the federal Executive Branch about legal rights and obligations. This memorandum does not apply to adjudicatory actions that do not have the aim or effect of binding anyone beyond the parties involved, documents informing the public of agency enforcement priorities or factors considered in exercising prosecutorial discretion, or internal directives, memoranda, or training materials for agency personnel. For more information, see "Memorandum for All Components: Prohibition of Improper Guidance Documents," from Attorney General Jefferson B. Sessions III, November 16, 2017. "Affirmative civil enforcement" refers to the Department's filing of civil lawsuits on behalf of the United States to

Guidance documents cannot create binding requirements that do not already exist by statute or regulation.

Accordingly, effective immediately for ACE cases, the Department may not use its enforcement authority to effectively convert agency guidance documents into binding rules.

Likewise, Department litigators may not use noncompliance with guidance documents as a basis for proving violations of applicable law in ACE cases.

The Department may continue to use agency guidance documents for proper purposes in such cases. For instance, some guidance documents simply explain or paraphrase legal mandates from existing statutes or regulations, and the Department may use evidence that a party read such a guidance document to help prove that the party had the requisite knowledge of the mandate.

However, the Department should not treat a party's noncompliance with an agency guidance document as presumptively or conclusively establishing that the party violated the applicable statute or regulation. That a party fails to comply with agency guidance expanding upon statutory or regulatory requirements does not mean that the party violated those underlying legal requirements; agency guidance documents cannot create any additional legal obligations.

This memorandum applies only to future ACE actions brought by the Department, as well as (wherever practicable) those matters pending as of the date of this memorandum. This memorandum is an internal Department of Justice policy directed at Department components and employees. Accordingly, it is not intended to, does not, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

---

recover government money lost to fraud or other misconduct or to impose penalties for violations of Federal health, safety, civil rights or environmental laws. For example, this memorandum applies when the Department is enforcing the False Claims Act, alleging that a party knowingly submitted a false claim for payment by falsely certifying compliance with material statutory or regulatory requirements.

State of New Mexico
Second Judicial District

Carl J. Butkus
District Court

Post Office Box 488
Albuquerque, NM 87103
505-841-7515
Fax: 505-841-5457
Email albdceg@njcourts.gov

September 18, 2017

Justin Pennington, Esq.

Deborah Wells, Esq.

Re: Augustine Stanley v. County of Bernalillo, Bernalillo County Commissioners, Tom Zdunek, County Manager, Ramon C. Rustin, Chief of Corrections
Second Judicial District Court Cause No. D-202-CV-2014-01033[1]

Dear Counsel:

Presently before the Court is "Defendants' Motion To Dismiss And Supporting Memorandum Brief" (Motion). The Court has thoroughly read the briefs. There has been argument on the Motion. The Court recognizes the significance of the issue and, as time has permitted, has undertaken significant independent research. Having reviewed a considerable amount of legal authority, the Court is of the opinion that while there is legal commentary sympathetic to plaintiff, the bulk of actual legal authority supports the position of defendants. Defendants' Motion, therefore, will be granted.

[1] At one time, this case was removed to federal court. Note, Stanley v. County Of Bernalillo Com'rs, 2015WL4997159 (D.N.M. 2015).

The Court notes the following case law essentially supporting the position of defendants: Casias v. Wal-Mart Stores, Inc., 695 F. 3d 428 (6 Cir. 2012); Swaw v. Safeway, Inc., 2015WL7431106 (W.D. Wash. 2015); Ross v. RagingWire Telecommunications, Inc., 174 P. 3d 200 (Cal. 2008)[2]; Roe v. TeleTech Customer Care Management (Colorado) LLC, 257 P. 3d 586 (Wash. 2011)[3]; Coats v. Dish Network, LLC, 350 P. 3d 849 (Colo. 2015)[4]; Washburn v. Columbia Forest Products, Inc., 134 P. 3d 161 (Oregon 2006)[5]; Emerald Steel Fabricators, Inc. v. Bureau Of Labor And Industries, 230 P. 3d 518 (Oregon 2010); Johnson v. Columbia Falls Aluminum Co., LLC, 213 P. 3d 789, 2009WL865308 (Montana 2009) [unpublished]; Hait v. Jess Howard Elec. Co., 2008WL4416654 (Ohio App. 2008), app. not allowed; Hice v. City Of Fort Smith, 58 S.W. 3d 870 (Ark. App. 2001); Laguerre v. Palm Beach Newspapers, Inc., 20 So. 3d 392 (Fla. App. 2009); Savage v. Maine Pretrial Services, Inc., 58 A. 3d 1138 (Maine 2013); Forest City Residential Management, Inc. v. Beasley, 71 F. Supp. 3d 715 (E.D. Mich. 2014).

In New Mexico, note Garcia v. Tractor Supply Company, 154 F. Supp. 3d 1225 (D.N.M. 2016), app. dismissed; Hemphill v. Liberty Mutual Insurance Company, 2013WL12123984 (D.N.M. 2013). But see, Vialpando v. Ben's Automotive Services, 2014NMCA084, 331 P. 3d 975 (Ct. App. 2014), cert. den. [reimbursement for medical marijuana use under Workers Compensation Act]; Maez v. Riley Indus., 2015NMCA049, 347 P. 3d 732 (Ct. App. 2015); Lewis v. American General Media, 2015NMCA090, 355 P. 3d 850 (Ct. App. 2015).

The Court also notes the following literature: Hickox, Drug Testing Of Medical Marijuana Users In The Workplace: An Inaccurate Test Of Impairment, 29 Hofstra Labor and Employment Law Journal 273 (2012); Sharp, Medi-Juana And The Workplace, 72-DEC Bench

[2] Note also, Ross v. RagingWire Telecommunications, Inc., 33 Cal. Rptr. 3d 803 (Cal. App. 2005).
[3] Note also, Roe v. TeleTech Customer Care Management (Colorado) LLC, 216 P. 3d 1055 (Wash. App. 2009).
[4] Note also, Coats v. Dish Network, LLC, 303 P. 3d 147 (Colo. App. 2013).
[5] Note also, Washburn v. Columbia Forest Products, Inc., 104 P. 3d 609 (Ore. App. 2005).

& B. Minn. 21 (2015); Goyette, Recreational Marijuana And Employment: What Employees Don't Know Will Hurt Them, 50 Gonzaga Law Review 337 (2014-15); Mkrtchyan, Initiative 692, Now And Then: The Past, Present, And Future Of Medical Marijuana In Washington State, 47 Gonzaga Law Review 839 (2011-12); Cole, Functional Preemption: An Explanation Of How State Medicinal Marijuana Laws Can Coexist With The Controlled Substances Act, 16 Mich. St. U.J. Med. & L. 557 (2012); Corp. Compl. Series: Drug Free Workplace, §1:21, §1:22, §1:23 (2010-11); Moberley & Hartsig, Smoke - - And Mirrors? Employers And The Arizona Medical Marijuana Act, 47- AUG Ariz. Att'y 30 (2011); Bowman & Longino, Taking The High Road – The Healthcare Provider's Duty To Accommodate Employees' Medical Marijuana Use, 5 J. Health & Life Sci. L. 34 (2012); DiFonzo & Stern, Divided We Stand: Medical Marijuana And Federalism, 27 No. 5 Health Law. 17 (2015); Zitter, Propriety Of Employer's Discharge Of Or Failure To Hire Employee Due To Employee's Use Of Medical Marijuana, 57 A.L. R. 6th 285.

The Court will grant "Defendants' Motion To Dismiss And Supporting Memorandum Brief." A separate order to that effect will be filed.

Very truly yours,

Carl Butkus
District Court Judge

154 F.Supp.3d 1225
32 A.D. Cases 824

Rojerio Garcia, Plaintiff,
v.
Tractor Supply Company, Defendant.

No. CV 15–00735 WJ/WPL

United States District Court, D. New Mexico.

Filed January 7, 2016

[154 F.Supp.3d 1226]

E. Justin Pennington, E Justin Pennington Law Offices, Albuquerque, NM, for Plaintiff.

Jessica R. Terrazas, Rodey Dickason Sloan Akin & Robb PA, Santa Fe, NM, Michael W. Fox, Ogletree Deakins Nash Smoak & Stewart PC, Austin, TX, for Defendant.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

WILLIAM P. JOHNSON, UNITED STATES DISTRICT JUDGE

THIS MATTER comes before the Court upon Defendant Tractor Supply Company's Motion to Dismiss (**Doc. 3**). Having reviewed the parties' briefs and the applicable law, the Court finds that Defendant's Motion to Dismiss is well taken, and therefore **GRANTED** , as herein described.

Background

This case concerns an issue of first impression in the District of New Mexico. Plaintiff Rojerio Garcia ("Mr.Garcia") suffers from HIV/AIDS, a serious medical condition as defined in the New Mexico Human Rights Act, N.M. Stat. Ann. § 28–1–1, *et seq* . (1978). Mr. Garcia's physicians recommended that treatment of his condition include the use of medical marijuana. Mr. Garcia subsequently applied for acceptance into the New Mexico Medical Cannabis Program, an agency of the New Mexico Department of Health. The New Mexico Medical Cannabis Program is authorized by the Lynn and Erin Compassionate Use Act ("CUA"), N.M. Stat. Ann. § 26–2B–1 (2007). The New Mexico Department of Health determined that Mr. Garcia met all the statutory and regulatory criteria for participation in the Medical Cannabis Program and issued him a Patient Identification Card.

[154 F.Supp.3d 1227]

Mr. Garcia thereafter applied for the job of Team Leader (Management) at Tractor Supply Company ("Tractor Supply"). During his initial employment interview, Mr. Garcia advised Tractor Supply's hiring manager of his diagnosis of HIV/AIDS and of his participation in the Medical Cannabis Program. Mr. Garcia was hired for the job, and on August 8, 2014, reported to a testing facility to undergo a drug test. The results of the drug test indicated that Mr. Garcia had tested positive for cannabis metabolites. On August 20, 2014, Tractor Supply's hiring manager discharged Mr. Garcia on the basis of the positive drug test. On October 2, 2014, Mr. Garcia filed a written complaint with the New Mexico Human Rights Division, alleging unlawful discrimination by Tractor Supply as defined by N.M. Stat. Ann. § 28–1–7 (2008). Mr. Garcia received a Determination of No Probable Cause from the New Mexico Labor Relations Division/Human Rights Bureau on April 15, 2015. Therefore, Mr. Garcia has properly exhausted his administrative remedies. Mr. Garcia subsequently filed suit on July 13, 2015 in the First Judicial District Court of Santa Fe County, New Mexico, alleging that Tractor Supply terminated him based on his serious medical condition and his physicians' recommendation to use medical marijuana. Tractor Supply timely removed the case to this Court on August 21, 2015.

Tractor Supply filed a Motion to Dismiss (**Doc. 3**) on August 28, 2015, arguing that Mr. Garcia failed to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Mr. Garcia filed his Response (**Doc. 8**) on September 18, 2015, and Tractor Supply filed their Reply (**Doc. 12**) on October 13, 2015. The Court held a hearing on the Motion to Dismiss on December 4, 2015.

Legal Standard

Federal Rule of Civil Procedure 12(b)(6) allows a party to move for dismissal of a case for failure to state a claim upon which relief can be granted. Rule 8(a)(2), in turn, requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Thus, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Although a court must accept all the complaint's factual allegations as true, the same is not true of legal conclusions. *See id.* Mere labels and conclusions" or "formulaic recitation [s] of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955. "Thus, in ruling on a motion to dismiss, a court should disregard all conclusory statements of law and consider whether the remaining specific factual allegations, if assumed to be true, plausibly suggest the defendant is liable." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir.2011).

Discussion

This case turns on whether New Mexico's Compassionate Use Act (CUA") *combined* with the New Mexico Human Rights Act provides a cause of action for Mr. Garcia. Ever-present in the background of this case is whether the Controlled Substances Act preempts New Mexico state law.

1. The Compassionate Use Act and New Mexico Human Rights Act

While some states, such as Connecticut and Delaware, have included within their medical marijuana acts affirmative requirements mandating that employers accommodate medical marijuana cardholders,

[154 F.Supp.3d 1228]

New Mexico's medical marijuana act has no such affirmative language. Mr. Garcia does not dispute that the CUA by itself provides no cause of action. Thus, Mr. Garcia argues in essence that the CUA makes medical marijuana an accommodation promoted by the public policy of New Mexico, and therefore, medical marijuana is an accommodation that must be provided for by the employer under the New Mexico Human Rights Act.

Tractor Supply counters that the CUA only offers users of medical marijuana limited immunity against state criminal prosecution and imposes no duty on employers to accommodate the use of medical marijuana. While an issue of first impression in the District of New Mexico, several cases from states that have approved medical marijuana prove instructive. *Curry v. MillerCoors, Inc.*, No. 12–cv–02471–JLK, 2013 WL 4494307 (D.Colo. Aug. 21, 2013) concerned an employee with hepatitis C who used medical marijuana and failed his employer's drug test. The court held that [d]espite concern for Mr. Curry's medical condition, anti-discrimination law does not extend so far as to shield a disabled employee from the implementation of his employer's standard policies against employee misconduct. In other words, a termination for misconduct is not converted into a termination because of a disability just because the instigating misconduct somehow relates to a disability."

Id. at *3 (internal citations omitted). A more recent District of Colorado case echoed the same reasoning: "Magistrate Judge Wang also correctly concluded that there was no basis for finding that Defendants terminated Plaintiff's employment **because of** his disability; the Complaint fails to allege a single fact to support the notion that Plaintiff's medical condition, or any accommodation for a medical condition, led to his termination." *Steele v. Stallion Rockies Ltd.*, 106 F.Supp.3d 1205 (D.Colo.2015) (emphasis in original).

Here, Mr. Garcia was not terminated because of or on the basis of his serious medical condition. Testing positive for marijuana was not because of Mr. Garcia's serious medical condition (HIV/AIDS), nor could testing positive for marijuana be seen as conduct that resulted from his serious medical condition. Using marijuana is not a manifestation of HIV/AIDS.

Tractor Supply cites two state cases and one federal case in support. However, two of the cases involved claims seeking an implied cause of action from the state medical marijuana statute itself, or relied on public policy grounds. Neither case was successful for the Plaintiff.[1] Here, however, Mr. Garcia does not dispute that the CUA itself provides no cause of action. The third case, from the California Supreme Court, more closely resembles the cause of action Mr. Garcia pleads. In *Ross v. Ragingwire Telecommunications, Inc.*, the Plaintiff suffered from back pain, used medical marijuana, failed a drug test, and was subsequently terminated. 42 Cal.4th 920, 70 Cal.Rptr.3d 382, 174 P.3d 200, 203 (2008). The Plaintiff sued under the California Fair Employment and Housing Act, which "requires employers in their hiring decisions to take into account

[154 F.Supp.3d 1229]

the feasibility of making reasonable accommodations." *Id.* , 70 Cal.Rptr.3d 382, 174 P.3d at 204. Plaintiff alleged that the employer failed to make reasonable accommodations for his disability. The California Supreme Court held that "[n]othing in the text or history of the Compassionate Use Act suggest the voters intended the measure to address the respective rights and obligations of employers and employees. The FEHA does not require employers to accommodate the use of illegal drugs." *Id.*

Mr. Garcia's strongest argument in response to the *Ross* case centers on several decisions by the New Mexico Court of Appeals holding that the Workers' Compensation Act authorizes reimbursement for medical marijuana. *See, e.g., Vialpando v. Ben's Auto. Servs.*, 331 P.3d 975, 979 (N.M.Ct.App.2014) (finding medical marijuana to be a reasonable and necessary medical treatment requiring reimbursement). These decisions point to "equivocal statements about state laws allowing marijuana use" made by the Department of Justice. *Id.* at 980. Thus, Mr. Garcia infers that it is plausible that New Mexico courts would also find medical marijuana to be a reasonable accommodation under the New Mexico Human Rights Act.

However, the Court finds Tractor Supply's rebuttal more persuasive. First, as Defendant argues, reliance on an enforcement policy of the United States Attorney General is not law, and instead, is merely an ephemeral policy that may change under a different President or different Attorney General. Second, and more importantly, there is a fundamental difference between: (i) requiring an insurance carrier to reimburse medical treatments that have been approved by a physician in a regulated system, such as medical marijuana, and (ii) requiring that a national employer permit and accommodate an individual's marijuana use that is illegal under federal law. This second point opens an important public policy argument. Were the Court to

agree with Mr. Garcia, and require Tractor Supply to modify their drug-free policy to accommodate Mr. Garcia's marijuana use, Tractor Supply, with stores in 49 states, would likely need to modify their drug-free policy for each state that has legalized marijuana, decriminalized marijuana, or created a medical marijuana program. Depending on the language of each state's statute, Tractor Supply would potentially have to tailor their drug-free policy differently for each state permitting marijuana use in some form.

In sum, the Court finds that the CUA combined with the New Mexico Human Rights Act does not provide a cause of action for Mr. Garcia as medical marijuana is not an accommodation that must be provided for by the employer. Tractor Supply did not terminate Mr. Garcia because of his serious medical condition, as marijuana use is not a manifestation of HIV/AIDS, nor is testing positive for marijuana conduct that resulted from Mr. Garcia's serious medical condition. While New Mexico state courts have found medical marijuana to be compensable under state workers' compensation laws, the Court finds a fundamental difference between requiring compensation for medical treatment and affirmatively requiring an employer to accommodate an employer's use of a drug that is still illegal under federal law.

2. The Controlled Substances Act and the CUA

Tractor Supply next argues that requiring accommodation of medical marijuana use conflicts with the Controlled Substances Act ("CSA") because it would mandate the very conduct the CSA proscribes. Several state courts have held that state

[154 F.Supp.3d 1230]

medical marijuana laws do not conflict with the CSA because the state laws merely provide limited state-law immunity from prosecution if individuals choose to engage in state-law compliant medical marijuana use. *See, e.g., Ter Beek v. City of Wyoming*, 495 Mich. 1, 846 N.W.2d 531 (2014) ; *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal.App.4th 734, 115 Cal.Rptr.3d 89 (Cal.Ct.App.2010). These courts have found that the state law does not present an obstacle to the accomplishment of the federal law and does not deny the federal government the ability to enforce the prohibition. Thus, "it is not impossible to comply with both the CSA's federal prohibition on marijuana and [the Act's] limited state-law immunity for certain medical marijuana use...." *Ter Beek*, 846 N.W.2d at 541.

Yet these cases addressed only whether the CSA preempted the state-law immunity that state medical marijuana acts granted its citizens. Here, Tractor Supply's argument is more nuanced than asserting that New Mexico's CUA itself is preempted by the CSA. Rather, Tractor Supply argues that interpreting the CUA and the Human Rights Act to require the company to accommodate Mr. Garcia's marijuana use would be preempted by the CSA. Thus, a closer case is a Supreme Court of Oregon case that examined whether the plaintiff's medical marijuana use constituted an "illegal use of drugs" under the state statutory provision governing his claim for employment discrimination. *See Emerald Steel Fabricators, Inc . v. Bureau of Labor & Indus.*, 348 Or. 159, 230 P.3d 518 (2010) (en banc). The court found that under Oregon's discrimination laws, the employer was not required to accommodate the employee's use of medical marijuana under the state's disability-discrimination statute, as marijuana is an illegal drug under federal law. *See id.* at 536. Judge Kistler, the author of the *Emerald Steel* opinion, presented a similar argument in his concurrence in an earlier case: "[t]he fact that the state may exempt medical marijuana users from the reach of the state criminal law does not mean that the state can affirmatively require employers to accommodate what federal law specifically

prohibits." *Washburn v. Columbia Forest Products, Inc.*, 340 Or. 469, 134 P.3d 161, 167–68 (2006).

The Court finds no conflict between these two lines of cases. State medical marijuana laws that provide limited state-law immunity may not conflict with the CSA. But here, Mr. Garcia does not merely seek state-law immunity for his marijuana use. Rather, he seeks the state to affirmatively require Tractor Supply to accommodate his marijuana use. Thus, the Court finds the Oregon cases closer to the fact of this case and more persuasive. To affirmatively require Tractor Supply to accommodate Mr. Garcia's illegal drug use would mandate Tractor Supply to permit the very conduct the CSA proscribes.

Accordingly, the Court finds that Defendant's Motion to Dismiss is well taken, and therefore **GRANTED**.

SO ORDERED.

Notes:

[1] *See Casias v. Wal–Mart Stores, Inc.*, 764 F.Supp.2d 914, 921 (W.D.Mich.2011) ("Plaintiff argues the MMMA provides him with an implied right of action. Even Mr. Casias acknowledges his chances on this theory are remote, given the strictness of the current test in Michigan case law."); *Roe v. Teletech Customer Care Management (Colorado) LCC*, 171 Wash.2d 736, 257 P.3d 586, 588 (2011) ("We hold that MUMA does not provide a private cause of action for discharge of an employee who uses medical marijuana, either expressly or impliedly, nor does MUMA create a clear public policy that would support a claim for wrongful discharge in violation of such a policy.").

NOTES

Sexual Harassment Training in the "Me Too" Era

SEXUAL HARASSMENT TRAINING IN THE #METOO ERA

Presented by Sam Adams and Alana De Young

ADAMS+CROW LAW FIRM

Definition of Illegal Harassment

SEXUAL HARASSMENT IS A FORM OF ILLEGAL DISCRIMINATION

BUT THE MEASURING STICK CHANGES AS SOCIAL EXPECTATIONS CHANGE...

Definition Of Illegal Harassment

THE BASIC DEFINITION OF HARASSMENT

1. UNWELCOME CONDUCT
2. IMPERMISSIBLE BASIS
3. SEVERE or PERVASIVE

http://www.eeoc.gov/laws/practices/harassment.cfm

Who Gets To Decide?

WHO GETS TO DECIDE?

The Jury will be asked to determine if a REASONABLE person in the victim's situation would have been offended

Mistakes Analyzing "Unwelcome"

MISTAKES ANALYZING "UNWELCOME"

Conduct is NOT harassment if it is WELCOME...
but WELCOME is in the eye of the beholder...

- ASSUMING a victim's silence means "welcome"
- ASSUMING a victim cannot revoke consent
- ASSUMING what "looks like...consent" means "welcome"
- ASSUMING conduct welcome from one is "welcome" from another
- ASSUMING *quid pro quo* doesn't happen anymore
- ASSUMING "unwelcome" conduct all looks the same
- ASSUMING "intent" counts
- ASSUMING the only person who can be a victim is the one at whom the conduct is directed

http://www.eeoc.gov/laws/practices/harassment.cfm

ADAMS+CROW LAW FIRM

THE PLAYERS

WHO CAN BE HARASSED?

- male to female; female to male; same sex or gender
- Scalia says the critical question: "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed[.]" *Joseph Oncale v. Sundowner Offshore Service* (1998).

WHO CAN BE THE HARASSER?

Not Just Supervisors
Peers
Vendors
Clients/Customers

ADAMS+CROW LAW FIRM

Adverse Action v. Hostile Work Environment

ADVERSE ACTION

- Fired,
- Demoted
- Lost promotion
- Poor evaluation
- Reassignment
- Loss of wages

HOSTILE WORK ENVIRONMENT

- Unwelcome conduct that UNREASONABLY INTERFERES with an employee's work performance or creates an intimidating, hostile, or abusive/offensive work environment
- e.g., repeated sexual comments make someone so uncomfortable at work that her/his performance suffers or if s/he declines professional opportunities because it will put her/him in contact with the harasser.

ADAMS+CROW LAW FIRM

"Severe" and "Pervasive"

SEVERE OR PERVASIVE SOUND LIKE A LOT TO PROVE

SEVERE

- One instance may be enough: a single act of unwanted touching or attempt to touch (private parts)

PERVASIVE

- constant comments about physical appearance or other characteristics vs. mere utterance or "stray remark"
- I like your hair, new shirt, new boots, new post-it notes (everyday), "let's get coffee," elevator eyes, jokes, stories, nicknames, unwanted attention, stalking (your cubicle ?)

ADAMS+CROW LAW FIRM

Employer's duty

PREVENT HARASSMENT

- Policy
- Training
- Open Door Policy
- Complaint Procedure (oh, and follow it)

STOP HARASSMENT

- Take complaints seriously
- Investigate
- Impose appropriate discipline

Special Nature of Retaliation

RETALIATION AGAINST SOMEONE WHO HAS ENGAGED IN PROTECTED ACTIVITY IS ILLEGAL

RETALIATION CLAIMS ACCOUNT FOR ALMOST HALF OF EEOC/HRB CHARGES FILED IN NEW MEXICO

Retaliation

TO PROVE RETALIATION, AN EMPLOYEE MUST SHOW

- Employee engaged in a "protected activity"
- The employee suffered adversity: "adverse action" or "hostile work environment"
- A causal connection between "protected activity" and "adversity"

Standard of Proof

Protected activities

- Opposing any discrimination or harassment
- Making a claim of discrimination or harassment
- Testifying in connection with someone else's claim of discrimination or harassment
- Assisting in someone else's claim of discrimination or harassment
- Participating in any manner in someone else's claim of discrimination or harassment
- **NOTE: the employee does NOT have to be right!**

Adverse employment actions

- Termination
- Alteration of terms/conditions of employment
- Bad reference
- Demotion
- Failure to promote
- Change of shift/duties

Contact Information

Sam Adams and Alana De Young
ADAMS+CROW LAW FIRM
5051 Journal Center, Suite 320
Albuquerque, NM 87109
(505) 582-2819
sam@adamscrow.com
alana@adamscrow.com

NOTES

The Future of Arbitration Agreements in Employment Law

EMPLOYMENT ARBITRATION: OVERVIEW AND 2018 DEVELOPMENTS

TRAVIS G. JACKSON

SARAH K. DOWNEY

JACKSON LOMAN STANFORD & DOWNEY

LITIGATION COSTS

- Litigation reflects over 50% of US legal expense
- US $21.1B annual litigation spend
- Most cost is in discovery
- 98.8% of federal civil cases settle before trial (2009)

SOURCE: 2011 SURVEY OF FORTUNE 1000 ADR STUDY CO-SPONSORED BY CPR INSTITUTE, STRAUSS INSTITUTE FOR DISPUTE RESOLUTION AT THE LAW SCHOOL OF PEPPERDINE UNIVERSITY, AND THE SCHEINMAN INSTITUTE ON CONFLICT RESOLUTION AT THE ILR SCHOOL OF CORNELL UNIVERSITY

ARBITRATION OF EMPLOYMENT DISPUTES SURGING

- In late 2017, a study by the Survey Research Institute at Cornell University determined that the number of private sector, non-union employees subject to mandatory arbitration agreements had dramatically increased in recent years.
- Between 1992 and the early 2000's, the percentage of employees subject to mandatory arbitration agreements had risen from just over two percent to almost one quarter of the U.S. work force.
- By the fall of 2017, the percentage of private sector, non-union employees subject to mandatory arbitration exceeded fifty-five percent.
- Today, approximately sixty million American employees are subject to mandatory employment arbitration agreements.

CHALLENGES TO ARBITRATION OF EMPLOYMENT DISPUTES

Typically, plaintiffs oppose arbitration because:

- No jury
- No appeal
- Limited discovery
- Belief that arbitrators are employer friendly
- Belief that costs are prohibitive

CHALLENGES TO ARBITRATION OF EMPLOYMENT DISPUTES

Many employers have adopted **mandatory arbitration agreements** that require employees to refer employment-related claims to individual arbitration and to forego bringing or participating in class or collective actions.

Since 2012, the National Labor Relations Board ("NLRB") has engaged in a broad-based effort to nullify these arbitration agreements, finding that employers' maintenance and enforcement of the agreements are unfair labor practices that violate employees' rights to engage in "concerted" activity under Section 7 of the National Labor Relations Act ("NLRA").

In *D.R Horton* and *Murphy Oil* decisions, both employers required employees to sign agreements requiring **individual arbitration** of employment disputes and **waiving employees' right to bring or participate in class or collective actions** in court or arbitral forums. When employees in each case filed collective actions in federal court alleging violations of the FLSA, the companies filed motions to enforce the arbitration agreements asking the courts to dismiss the cases and refer them to binding arbitration on an individual basis without class or collective treatment.

THE FAA:

CONGRESSIONAL DIRECTIVE THAT COURTS TREAT ARBITRATION AGREEMENTS AS VALID AND ENFORCEABLE

- Seeking to reverse courts' routine refusal to enforce arbitration agreements, Congress passed the FAA in 1925, which states in relevant part that an agreement in commerce that evidences a desire to settle disputes by arbitration "shall be valid, irrevocable, and enforceable."
- But in Congress's judgment, arbitration had more to offer than courts recognized—not least the promise of **quicker, more informal, and often cheaper resolutions for everyone involved**." *Epic Sys. Corp.*, 2018 WL 2292444, at *5. "So Congress directed courts to abandon their hostility and instead treat arbitration agreements as 'valid, irrevocable, and enforceable.'" (Id. quoting 9 U.S.C. § 2).
- Indeed, "[a] primary purpose of the FAA is to require [state] courts to compel arbitration in cases where the parties agree to arbitrate and to place arbitration agreements upon the same footing as other contracts.'" *DeArmond v. Halliburton Energy Servs., Inc.*, 2003-NMCA-148, ¶ 7, 134 N.M. 630, 634, 81 P.3d 573, 577 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991)).

U.S. SUPREME COURT ENFORCEMENT OF FAA

***Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)**

Individual could be compelled under the FAA to arbitrate an alleged violation of the Age Discrimination in Employment Act.

AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)

Class action waivers in arbitration agreements in the commercial context were valid and enforceable.

The FAA preempts any state law that otherwise favors class actions over individual arbitration.

FAA preempted a California law that disallowed class action waivers.

***American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013)**

Class action waivers are enforceable even if the practical effect is to make any litigation unlikely because the costs of bringing an individual claim exceed the expected recovery.

FAA allows parties to substitute arbitration for court litigation and to set the terms of arbitration, even when those terms make it unlikely that a particular type of claim (a low-value individual claim) will be brought in the first place.

EPIC SYSTEMS CORP. V. LEWIS (2018): EMPLOYMENT ARBITRATION AGREEMENTS WITH CLASS ACTION WAIVERS ARE ENFORCEABLE

Split in the Circuits.

Supreme Court consolidates three separate cases where employees signed employment agreements to **individually** arbitrate disputes arising out of their employment and to **waive any class or collective claims**.

Plaintiffs brought class or collective actions in federal court asserting wage and hour violations related to overtime pay under the Fair Labor Standards Act ("FLSA") and analogous state laws. In each case, the plaintiffs argued that the class action waivers were unenforceable under the NLRA and the FAA's savings clause.

5-4 Decision

Justice Gorsuch: "[t]he NLRA secured employees' rights to organize and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."

The FAA's "savings clause" does not apply here because it only allows invalidation of arbitration agreements on grounds that exist for the revocation of "any" contract—i.e., invalidation by generally applicable contract defenses, such as fraud, duress, or unconscionability.

IMPACT OF *EPIQ*

US Supreme Court trend of enforcing arbitration agreements unlikely to change as court becomes more conservative.

Increased findings that FAA preempts state law may void many state laws on arbitration, including the New Mexico Uniform Arbitration Act.

Potential for fewer class and collective action claims. Employees may hesitate to pursue arbitration claims as too expensive to pursue on an individual basis.

Employers may next contend that class action waivers are enforceable in other contexts, including the benefits plans arena even though such actions are governed by Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, which allows employees to sue on behalf of a benefit plan.

IMPACT ON #METOO

Can Employer require arbitration of sexual harassment claims?

The decision may have potential implications for states responding to the #MeToo movement with legislation to restrict the ability to arbitrate claims of sexual harassment.

Epic supports arguments that the FAA preempts state laws restricting the enforceability of arbitration in cases alleging sexual harassment or sex discrimination.

Ending Forced Arbitration of Sexual Harassment Act, a current bill pending, in Congress, may impact the analysis.

In her dissent, Judge Ginsberg made the case for limiting the decision so that cases brought under Title VII could not be included in an arbitration waiver. That position not addressed by majority.

Court's ruling does not limit EEOC's ability to bring class actions on behalf of clients.

FEDERAL VS STATE ENFORCEMENT

New Mexico Uniform Arbitration Act

Despite the Congressional directive to treat arbitration agreements as valid and enforceable, state courts, including those in New Mexico, frequently rely on the FAA's savings clause (which allows for the non-enforcement of an arbitration agreement upon such grounds as exist at law or in equity for the revocation of any contract) to invalidate arbitration agreements.

NEW MEXICO UNIFORM ARBITRATION ACT

Enacted in 1971

Expression of a public policy favoring arbitration. *See United Tech. & Res., Inc. v. Dar Al Islam,* 1993–NMSC–005, ¶ 11, 115 N.M. 1, 846 P.2d 307, 309 ("The legislature and the courts of New Mexico 'have expressed a strong policy preference for resolution of disputes by arbitration.' ")(quoting *Dairyland Ins. Co. v. Rose*, 1979–NMSC–021, ¶ 14, 92 N.M. 527, 591 P.2d 281, 284).

Intended to reduce courts' caseloads. *See Bd. of Educ. Taos Mun. Sch. v. Architects, Taos*, 1985–NMSC–102, ¶ 10, 103 N.M. 462, 709 P.2d 184, 186 ("A concern for preserving scarce judicial resources lies at the heart of the preference for arbitration."); *Dairyland Ins. Co. v. Rose*, 1979–NMSC–021, ¶ 19, 92 N.M. 527, 591 P.2d at 285 (finding that "the legislative intent in enacting the [NMUAA], and the policy of the courts in enforcing it, is to reduce caseloads in the courts, not only by allowing arbitration, but also by requiring controversies to be resolved by arbitration where contracts or other documents so provide").

NMUAA VS FAA

"In the arbitration of a dispute between a . . . employee and another party, a **disabling civil dispute clause** contained in a document relevant to the dispute is unenforceable against and voidable by the . . . employee.

New Mexico Uniform Arbitration Act , NMSA § 44-7A-5

NMUAA VS FAA

"(4) "disabling civil dispute clause" means a provision modifying or limiting procedural rights necessary or useful to a consumer, borrower, tenant or employee in the enforcement of substantive rights against a party drafting a standard form contract or lease, such as, by way of example, a clause requiring the consumer, tenant or employee to:

- (a) assert a claim against the party who prepared the form in a forum that is less convenient, **more costly** or more dilatory than a judicial forum established in this state for resolution of the dispute;
- (c) forego access to the **discovery of evidence** as provided in the rules of procedure of a convenient judicial forum available to hear and decide a dispute between the parties;
- (d) present evidence to a **purported neutral person** who may reasonably be expected to regard the party preparing the contract as more likely to be a future employer of the neutral person;
- (e) forego **recourse to appeal** from a decision not based on substantial evidence or disregarding the legal rights of the consumer, tenant or employee;
- (f) **decline to participate in a class action**; or
- (g) **forego an award of attorney fees, civil penalties or multiple damages** otherwise available in a judicial proceeding;

PROCEDURAL UNCONSCIONABILITY:

Looks at how the arbitration agreement was formed.

Was there uneven bargaining power between the parties?

Was the employee was forced to sign the agreement under duress?

Was the employee was given enough time to read the agreement?

Was the employee shown the entire agreement?

Was the employee permitted to speak to an attorney?

Was the employee threatened with the loss of his or her job or other benefit if he/she did not sign the agreement?

Was there consideration?

Was the employee told that the arbitration agreement was not important or that it was unnecessary to read it before signing?

Was the agreement in fine print and hidden in other documents?

SUBSTANTIVE UNCONSCIONABILITY

The cost of the arbitration to the employee?

Is there assurance of a neutral arbitrator?

Will there be meaningful discovery?

Limitations on the relief the employee could get in arbitration versus court

Mutuality-are both employer and employee bound to arbitrate claims?

Overall balance in the obligations imposed.

PRACTICE POINTERS

Waiver

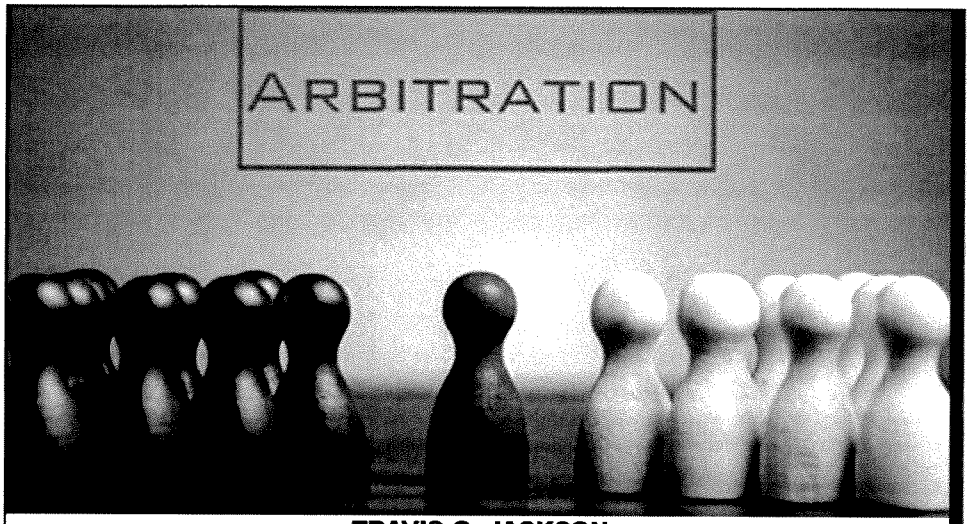
Preemption

- FAA applies in state court,
- FAA does not create federal jurisdiction

Immediate appeal

Local rule

AAA, JAMS, vs individual arbitrator



TRAVIS G. JACKSON
SARAH K. DOWNEY

JACKSON LOMAN STANFORD & DOWNEY

NOTES

The New Tax Act and Its Effect on Employment Law

NOTES

Conflicts of Interest and Ethical Considerations

CONFLICTS

- CONCURRENT RULE - 16-107
  - **TWO CLIENTS** (including present/present and present/former)
  - A CLIENT AND A THIRD PARTY
  - A CLIENT AND THE LAWYER'S INTERESTS

IN THE LABOR AND EMPLOYMENT CONTEXT

- The Two (or sometimes more) clients tend to be
  - Employer

  - Employee

DUTIES TO CLIENTS CONCURRENT CONFLICTS

- **Rule 16-107 Conflict Of Interest: Current Clients**
- (a) A concurrent conflict of interest exists if:
  - (1) the representation of one client will be directly adverse to another client; or
  - (2) there is a **significant risk** that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

DUTIES TO CLIENTS CONCURRENT CONFLICTS

- If there is a conflict, whether directly adverse or a substantial limitation,
- Is representation "consentable?"
- This does not mean will the client consent; it means can I seek consent – can I reasonably believe I can represent both in compliance with the Rules of Professional Conduct?

BEFORE YOU SEEK CONSENT

- You have to answer three questions before you get to the issue of whether you can ask clients for consent when there is a concurrent conflict

DUTIES TO CLIENTS CONCURRENT CONFLICTS

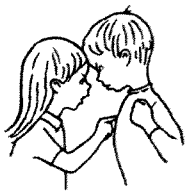
(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client
  - Not a subjective belief by the lawyer
  - Factors to consider
    - How divergent are the interests of the clients
    - Client sophistication
    - How closely related are the matters?

DUTIES TO CLIENTS CONCURRENT CONFLICTS

- (2) the representation is not prohibited by law
- Statutory or Admin Rules
  - For example:
    - Capital murder cases and two defendants
    - Fed. Govt. lawyer cannot bring suit against U.S.

DUTIES TO CLIENTS CONCURRENT CONFLICTS

- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal

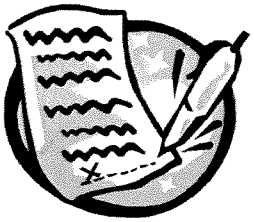


DUTIES TO CLIENTS CONCURRENT CONFLICTS

- Some conflicts cannot be waived – "Nonconsentable"
  - Prohibited by law
  - Directly adverse to clients in same litigation
  - **No reasonable lawyer could believe there would not be a material limitation**
  - Cannot represent one or both without having to disclose **confidential information** that lawyer is not authorized to disclose – i.e. would require a violation of Rule 16-106

BUT IF IT CAN BE WAIVED

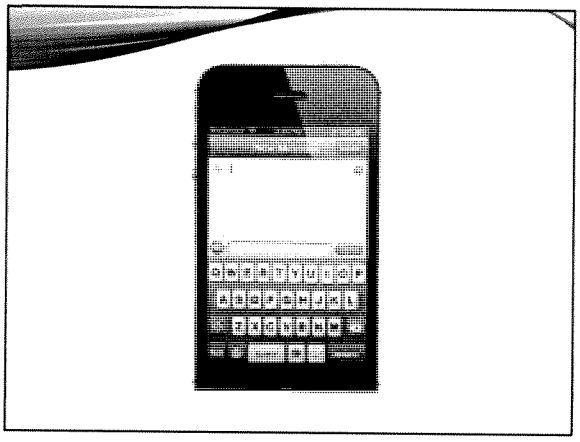
- Informed Consent from Both – Confirmed in Writing



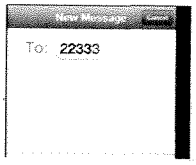
LET'S TRY ONE

- BigCo's Truck, driven by Sam, collides with Tiff who sues both BigCo and Sam

•PLEASE GET OUT YOUR SMARTPHONES



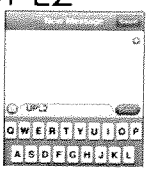
IN THE "TO:" FIELD ON YOUR SEND A MESSAGE SCREEN TYPE IN 22333



- Like this .....
- Don't worry if it adds a d... and ...oks like this 22...

IN THE "MESSAGE" FIELD TYPE IN UPL2

Like this .....



And Press **SEND**

You should get a return message that says

YOU'VE JOINED WILLIAM SLEASE'S SESSION (UPL2). WHEN YOU'RE DONE, REPLY LEAVE - - - POWERED BY POLLEVERYWHERE.COM

STAY WITH THAT MESSAGE SCREEN FOR ALL THE QUESTIONS TO FOLLOW

REMEMBER

- BigCo's Truck, driven by Sam, collides with Tiff who sues both BigCo and Sam

a conflict in lawyer representing both (or a potential conflict)?

Yes

No

Start the presentation to activate live content

Is it consentable?

Yes

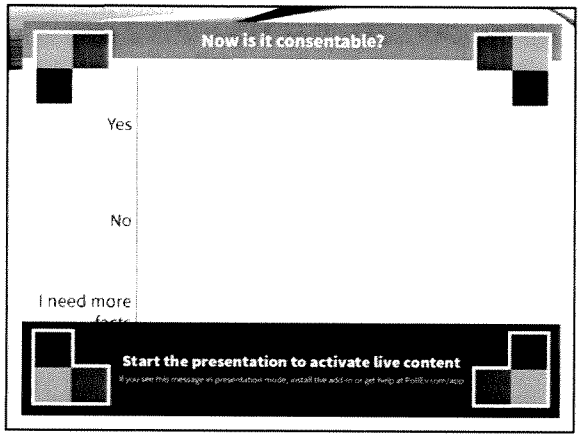
No

I need to know

Start the presentation to activate live content

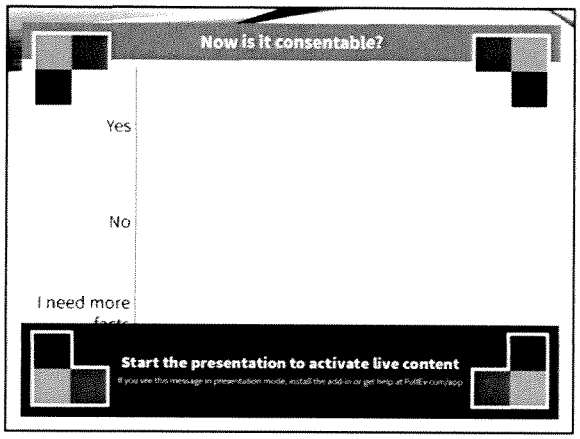
LET'S ADD TO THE FACTS

- SAM WAS DRIVING DRUNK



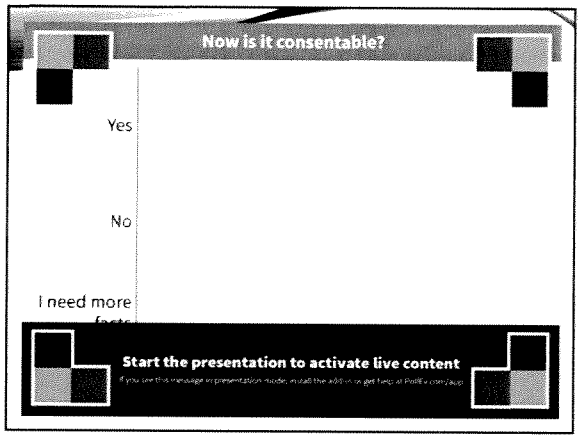
HOW ABOUT INSTEAD . . .

- SAM WAS NOT DRUNK, BUT CONFIDES IN YOU THAT THE COMPANY HAS BEEN TRYING TO SAVE MONEY BY ENCOURAGING DRIVERS TO PULL OVERTIME BEYOND DOT APPROVED SHIFTS – HE WAS O/T AT THE TIME AT DIRECTION OF HIS BOSS AND LITERALLY ASLEEP AT THE WHEEL



HOW ABOUT INSTEAD . . .

- SAM CONFIDES IN YOU THAT HIS BOSS IS CONSTANTLY SEXUALLY HARASSING THE OFFICE STAFF AND HE REALLY DOESN'T CARE FOR HIM BUT, WHEN IT COMES TO SAFETY, THE BOSS IS A-1 AND THE ACCIDENT WAS COMPLETELY TIFF'S FAULT.



CONCURRENT CONFLICTS RULE 16-107

- Do you have a conflict?
- If yes, can you seek reasonably continue/seek consent?
- If you cannot seek consent - decline or withdraw (one or both)
- If yes, you can seek consent, consult/disclose and obtained informed consent confirmed in writing.

WHO USUALLY PAYS?

16-108(F) COMPENSATION FROM THIRD PARTY.

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives **informed consent**;
- (2) there is **no interference** with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by **Rule 16-106** NMRA of the Rules of Professional Conduct.

RULE 16-113 – WHO DO YOU REPRESENT?

- Addresses the issue of a lawyer representing an organization
  - Who is the client?
    - The organization, not the individual officers, employees, directors, shareholders

16-110 IMPUTATION

- Think "Infections"
  - Is it personal?
  - Can you screen with Notice?
  - Read the *Mercer* case

RULE 16-113

- If you represent both the organization and the employee, what about the confidences under Rule 16-106?
  - Treat the same as any joint representation
    - Inform clients you will share all communications (16-104)
    - If client wants to share confidential information and not have other client informed - May result in nonconsentable conflict and you may have to withdraw

DOES THAT WORK IN THE INSURANCE WORLD AS WELL?

- The tripartite wrinkle

NOTES