Diversity & Inclusion - 2019

Considerations and more….

New York State Bar Association

CLE Program – August 15, 2019

By: Prof. Michael L. Fox, J.D.
Assistant Professor of Business Law – Mount Saint Mary College
Assistant Adjunct Professor of Law – Columbia University School of Law

1

- **Please note that all materials and citations provided herein are for reference only. The materials were prepared some time before the presentation. Therefore, please ensure to cite check all materials and cases before use.**

2

What We Will Address:

I. New York State Human Rights Law
II. Title VII of the Civil Rights Act (Federal)
III. New Ground on protection of Sexual Orientation
IV. Federal Family Medical Leave Act (FMLA)
V. New York State Paid Leave
VI. Americans with Disabilities Act

VII. *Hypothetical Scenarios*

3

Note: In June 2019, the New York State Legislature continued its actions in strengthening anti-discrimination, anti-harassment and anti-retaliation laws. *Bills – S6577/A8421*.

As of the writing of these materials, the Bill(s) ("Amendments" to the NYS Human Rights Law, *et al*.) that passed the Assembly and Senate had not yet been signed into law by the Governor, although he has expressed support. Thus, in these materials, mention is made of Pending Changes (noted in red where applicable).

If the Governor signs the Bill, as expected, some changes are immediate, and others take effect 60, 180 or 365 days later.*

**See Special Bulletin*, Stroock & Stroock & Lavan, LLP (June 25, 2019); D. Clark, *Sexual Harassment Laws to Change in NY Under Bill Passed by Legislature*, N.Y. L.J. (June 19, 2019).

4

I. New York Human Rights Law/Executive Law

- N.Y. Executive Law § 290, *et seq.*
- *Applies to employers of 4 or more (**CHANGES PENDING** – Amendments Act passed by State Legislature in June 2019 may reduce number to 1 employee or more in cases of discrimination and harassment – prior to this, was 1 only for alleged sexual harassment. In addition, protection for domestic workers to be extended to match basis for harassment claims for other employees under NYS HRL).*
- "1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right."
- "2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, as specified in section two hundred ninety six of this article, is hereby recognized as and declared to be a civil right."

New York Human Rights Law (Executive Law) § 291.

- NOTE ALSO: In July 2019, Governor Cuomo signed the amendments to the *Dignity for All Students Act*, which makes it illegal to discriminate against someone on the basis of their hairstyle both in schools and the workplace. Often, that form of discrimination accompanied race/gender discrimination. New York is the second state, following California, to expand this protection.

5

Be Careful Employers – Employees "Too Cute"?

- In the case of Edwards v. Nicolai, 153 A.D.3d 440, 60 N.Y.S.3d 40 (1st Dep't 2017), plaintiff was terminated as a yoga and massage therapist at a chiropractic practice because the wife and co-owner of the business believed plaintiff was "too cute", and the wife was becoming jealous that the husband co-owner of the business might become attracted to the plaintiff.
- There was no inappropriate interaction between plaintiff and the defendant husband. However, the First Department reversed the trial court, and held that the circumstance of plaintiff's firing was sufficient to raise a claim of gender discrimination under both the State and New York City Human Rights laws.

6

Aiding & Abetting

- In New York - § 296(6) prohibits aiding and abetting discrimination. Can be claim against individual person. Must prove the underlying discrimination claim first. See Haggood v. Rubin & Rothman, LLC, 2014 WL 6473527 at *22 (E.D.N.Y. 2014); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 314 (N.Y. 2004).
- So could be asserted against a manager or supervisor, or someone else in the company, who as an individual contributed to, aided or abetted the discriminatory treatment.
- Not available claim under Federal law.
- ***Pending Changes in NY Law (Amendments Act of June 2019 added term "private employer" including "person". Could result in individual liability for employer, in cases of discrimination, harassment or retaliation. May no longer need Aiding & Abetting, and showing of underlying liability first)***

7

- **With regard to claims of Sexual Harassment – Briefly on three (3) new laws in New York, following signing of the New York State 2019 Budget Bill by Governor Cuomo.**
  - New **Section 201-g of the Labor Law** (eff. Oct. 9, 2018) – Requires DOL and DHR to create and publish a model sexual harassment policy, with the following: *inter alia*, to prohibit harassment, include information on statutory provisions, include a standard complaint form, and inform employees of their rights. DOL and DHR must also produce a model sexual harassment prevention training program for the workplace. Employers must have written policies, and training, covering specific issues – *inter alia*, examples of conduct, remedies, standard complaint forms, procedures, and anti-retaliation provisions. *All bidders for state contracts must certify they implemented written policies for harassment prevention and provide annual training, covering the above. **Employers will have to provide at time of hire, and annually, notice and the provisions of the policies.***
  - New **Section 296-d of the Executive Law** (Human Rights Law) (eff. immediately) – expands liability and the negligence standard for an employer to prevent or stop harassment of an employee by a co-worker to harassment by an employee of a **non-employee** (consultant, vendor or contractor). Never included before. If know or should have known a non-employee sexually harassed in the employer's workplace, must address it. *[Note: Employers are already obligated to assist and protect employees harassed by non-employees or vendors – ex. of waitress and diner patrons.]* ***Change Pending – Will expand this provision to other forms of discrimination and harassment.***
  - New **Section 7515 of the CPLR** – Prohibits (unless inconsistent with federal law) pre-dispute mandatory arbitration provisions that require the parties to arbitrate sexual harassment claims, as those provisions are included in written contracts entered after July 11, 2018; and would make clauses void in existing agreements after effective date, except for the arbitrability of other claims. *Does not impact agreements made after a dispute arises.* ***Change Pending – To be expanded to all harassment, discrimination and retaliation claims. Some note there may be federal pre-emption challenges here under the FAA.***
  - There are also amendments to **CPLR 5003-b** and **General Obligations Law § 5-336** (eff. July 11, 2018), which will limit the use of confidentiality and non-disclosure agreements connected to resolution of sexual harassment claims in New York. Plaintiff employees must have 21 days to consider any provision, and 7 days to revoke after signing (which revokes entire agreement); and terms preventing disclosure of underlying facts and circumstances due to confidentiality must be at the plaintiff employee's preference. As of January 2020, express provision must also exist to advise employee they may speak with counsel, EEOC, etc. ***Pending change – Non-disclosure must be at claimant's preference; will include all discrimination, harassment and retaliation claims; cannot prevent initiating, assisting or complying with subpoena in case or investigation; cannot prohibit disclosing facts for filing for Medicaid, unemployment, or other benefits.***

See Special Bulletin, Stroock & Stroock & Lavan, LLP (Apr. 17, 2018); Schwartz & Salins, *New York Employers Face New Sexual Harassment Legislation*, N.Y.L.J. at 3 (June 1, 2018); *Special Bulletin*, Stroock & Stroock & Lavan, LLP (June 25, 2019).

8

II. Title VII of the Civil Rights Act

- Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, 42 U.S.C. § 2000e, *et seq*.
- Not every employer is an "employer" under the Act.
- "The term 'employer' means a person engaged in an industry affecting commerce who has **fifteen or more employees** for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service… or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 […Internal Revenue Code of 1986],…." 42 U.S.C. § 2000e(b) (emphasis added)

9

Title VII

- Provides: "It shall be an unlawful employment practice for an employer -

  (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of such individual's race, color, religion, sex, or national origin**; or

  (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, **because of such individual's race, color, religion, sex, or national origin**."

  42 U.S.C. § 2000e-2 (emphasis added)

- Remember – Age is covered by the ADEA; disabilities under ADA and FMLA; pregnancy discrimination is considered gender/sex discrimination, and the Pregnancy Discrimination Act was added to Title VII through amendment; and sexual orientation/sexual preference IS NOT protected under federal law. It is protected under New York State and New York City laws, though.

10

Pregnancy Discrimination

- The Pregnancy Discrimination Act was an amendment to Title VII. 42 U.S.C. § §2000e(k). The New York State Human Rights Law and New York City Human Rights Law also prohibit pregnancy discrimination.
- According to the EEOC: "Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, which covers employers with 15 or more employees, including state and local governments. Title VII also applies to employment agencies and to labor organizations, as well as to the federal government. Women who are pregnant or affected by pregnancy-related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations." https://www.eeoc.gov/facts/fs-preg.html
- Even if the pregnancy ends before lawsuit commenced, okay because pregnancy is a situation with a finite period of time, so long as the claim is filed within the governing statutes of limitation.

11

A brief mention – Equal Pay

- Recent court decision of the United States Court of Appeals for the Ninth Circuit (based in San Francisco, California). The original decision held that when it comes to pay differentials in the workplace and pay decisions by employers, prior salaries may be considered if the pay differential based on prior salary is based on any factor other than sex (gender), and it is up to the employer to show that it was the factor other than sex (gender) that caused the pay differential when there are legal challenges based on claims of gender discrimination. See Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2017). **However, after rehearing *en banc* was granted 869 F.3d 1004 (9th Cir. Aug. 29, 2017), the Ninth Circuit reversed that holding, and overruling Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982), and held that the Equal Pay Act clearly provides that an employer cannot justify a pay differential between men and women by relying on prior salary. *See* Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (Reinhardt, J.). *BUT reversed by U.S. Supreme Court because Judge Reinhardt passed away before decision rendered. Being re-heard by Circuit.***
- *Consider this – using prior salary as a justification would basically permit the perpetuation of discrimination. If the prior salary was lower simply based on the sex/gender of the employee, then use of that prior salary to justify a present salary perpetuates the discrimination.*
- Compare the Ninth Circuit decision with two legislative acts closer to home: (1) New York State's Pay Equity Act in 2019, signed by Governor Cuomo in July 2019; and (2) New York City **Local Law 67 of 2017, codified at N.Y.C. Admin. Code § 8-107(25).** The State Law prohibits differences in pay based on any protected class characteristic. They both forbid employers from inquiring about prior salaries at any stage of the interview process. If the interviewer already knows the prior history, that information cannot be relied upon in determining compensation of the employee. In New York City, *the employer can inquire as to salary and benefits expectations. In addition, if the interviewee truly volunteers the information, the employer can verify the information, and can then consider the history.* See, *inter alia*, http://pubadvocate.nyc.gov/news/articles/groundbreaking-equal-pay-legislation-passes-new-york-city; https://davidrichlaw.com/employers-in-new-york-city-barred-from-asking-about-salary-history-of-job-applicants/.
- **See also, for comparison, recent statutory enactment in Iceland, which took effect in 2018.**

12

Religious Beliefs & Accommodations

- This area hinges both on employer and employee actions.
- Plaintiff must have a genuine religious practice, conflicting with a requirement of the job (this is usually work schedules and observance of Sabbath days). Plaintiff's *prima facie* case – (1) *bona fide* religious beliefs, conflicting with employment requirements, (2) employer informed, and (3) employee disciplined or suffers adverse employment action because of conflict with employment requirements.
- Also, employer, when on notice, must offer reasonable accommodation (we will discuss more when we get to ADA).
- If employer offers full accommodation, it does not have to be what the employee requests. It must simply resolve the conflict completely. See Mereigh v. N.Y. & Presbyterian Hosp., 2017 WL 5195236 (S.D.N.Y. Nov. 9, 2017).
- BUT, if employer fails, and accommodation offered does not fully resolve conflict, then employer faces liability. See Jamil v. Sessions, 2017 WL 913601 (E.D.N.Y. Mar. 6, 2017).
- If employee fails to act in good faith, and rejects accommodation for unacceptable reason (such as "family reasons" not religious practices), then employer generally not liable. See Moore v. City of New York, 2018 WL 3491286 (S.D.N.Y. July 20, 2018).

13

A note on Age

- The federal *Age Discrimination in Employment Act (ADEA)* has provisions prohibiting both disparate treatment (§4(a)(1)) and disparate impact (§4(a)(2)) based on age.
- However, the 7th and 11th Circuits have both held that with regard to disparate impact claims, protections only extend to employees, NOT applicants.
- Kleber v. CareFusion Corp., 914 F.3d 480 (7th Cir. 2019) (*en banc*) (citing Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 964 (11th Cir. 2016) (*en banc*)).

14

- In Kleber, the attorney applicant, aged 58 with many years of experience, was passed over for a 29-year-old applicant who had many fewer years of experience.
- "The job description required applicants to have '3 to 7 years (no more than 7 years) of relevant legal experience.'"
- The applicant aged 29 met but did not exceed the range specified for years of experience.
- Kleber filed suit under the ADEA, both Sections 4(a)(1) and 4(a)(2).
- District Court dismissed Section 4(a)(2) disparate impact claim citing earlier 7th Circuit holding.
- *Kleber voluntarily dismissed Section 4(a)(1) disparate treatment claim.*
- 7th Circuit panel reversed District Court on 4(a)(2) holding.
- 7th Circuit granted re-hearing *en banc*, and affirmed District Court (reversing the panel decision). The plain language of section 4(a)(2) makes clear that Congress, while protecting employees from disparate impact age discrimination, did not extend same protection to outside job applicants. Court believed holding reinforced by ADEA's structure and history.
- As of time these materials written – Kleber and AARP were seeking a grant of cert by U.S. Supreme Court.

15

Kleber v. CareFusion Corp.,
914 F.3d 480 (7th Cir. 2019) (*en banc*)

- "By its terms, §4(a)(2) proscribes certain conduct by employers and limits its protection to employees. The prohibited conduct entails an employer acting in any way to limit, segregate, or classify its employees based on age. The language of § 4(a)(2) then goes on to make clear that its proscriptions apply only if an employer's actions have a particular impact—'depriv[ing] or tend[ing] to deprive any individual of employment opportunities or otherwise adversely affect[ing] his status as an employee.' This language plainly demonstrates that the requisite impact must befall an individual with 'status as an employee.'…"
- "Subjecting the language of §4(a)(2) to even closer scrutiny reinforces our conclusion. Congress did not prohibit just conduct that 'would deprive or tend to deprive any individual of employment opportunities.' It went further. Section 4(a)(2) employs a catchall formulation—'or otherwise adversely affect his status as an employee'—to extend the proscribed conduct. Congress's word choice is significant and has a unifying effect: the use of "or otherwise" serves to stitch the prohibitions and scope of § 4(a)(2) into a whole,…."

16

Now, For a claim of discrimination to be made…

- Unless a disparate impact or disparate treatment claim – where the single incident is the discrimination suffered – a claim must be more than episodic. See Moore v. City of New York, 2018 WL 3491286 (S.D.N.Y. July 20, 2018). Either continuing and pervasive discriminatory treatment or environment, or a single bad act that serves to alter the conditions of employment such to give rise to a claim. See 42 U.S.C. 2000e-2; Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59 (2d Cir. 1992); Galimore v. City Univ. of New York Bronx Comm. College, 641 F.Supp.2d 269 (S.D.N.Y. 2009).
- Employer must be on notice, unless supervisor or manager commits the claimed acts, in which case employer is deemed bound and vicariously liable.
- "Supervisor" – Not all supervisors are "supervisors" such that their actions can bind the company. Following the U.S. Supreme Court's decision in Vance v. Ball State University, 133 S.Ct. 2434 (2013), the Court held that: "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim".
- Otherwise, the employee is a co-employee or co-worker, and the victim must report up the chain or otherwise place a supervisor or manager (the company) on notice of the issue/complaint, so that the employer has an opportunity to correct. If the manager/supervisor, company officer, "the boss" is witnessing and not correcting, or indirectly participating, then argument can be made that notice provided.
- Employee must also suffer an adverse employment action. **Absent that, there is no claim.** *See* Gibson v. N.Y.S. Office of Mental Health, 6:17-CV-0608 (GTS) (N.D.N.Y. Apr. 24, 2018) (Suddaby, C.J.).

17

McDonnell Burden Shifting Analysis

- McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Burden **first** on the plaintiff – *prima facie* case of discrimination. Showing: (1) that she is within a protected group; (2) that she applied for and was qualified for the job at issue; (3) that she was subjected to an adverse employment action; and (4) that this action occurred under circumstances giving rise to an inference of discrimination….
  - Burden is not usually a high one, but plaintiffs have failed.

18

Whigham-Williams v. Am. Broadcasting Co., Inc., 2018 WL 4042110 (S.D.N.Y. Aug. 22, 2018):

- The plaintiff did "not sufficiently allege a specific position she applied for and was rejected from. Plaintiff does not allege anywhere in the complaint that there was an opening for a co-anchor position on Good Morning America, Plaintiff concedes that her talent agency contacted executives at ABC regarding 'potential openings' for a co-host position on Good Morning America…. Additionally, Plaintiff does not sufficiently allege that she was 'qualified for [the] job.'… Plaintiff alleges that she has an Associate's degree, is studying law and theology, and is a member of two professional organizations…. However, she fails to explain how those credentials qualify her to be a co-anchor on Good Morning America." Michael Strahan was hired as the new co-anchor.

  Plaintiff's case was dismissed.

But see Collins v. Resource Ctr. for Indep. Living, 2018 WL 5983377 (N.D.N.Y. Nov. 14, 2018) (Kahn, D.J.) (plaintiff did make prima facie case for first step, Title VII claim survived motion for judgment on the pleadings).

19

If plaintiff can overcome *prima facie* burden, however….

- Then burden ***shifts*** to employer to provide a legitimate, non-discriminatory reason for the termination or adverse employment action. IF employer meets burden….
- Burden ***shifts*** **back** to the employee-plaintiff in the ***final step***, wherein plaintiff must prove that the proffered reason is a pretext, and that there was discriminatory action. If not able, defense can succeed on motion for summary judgment.
- Often, because an employer that has engaged in discrimination is unlikely to leave a "smoking gun," a plaintiff usually must rely on "the cumulative weight of circumstantial evidence" when proving bias.
- *See also* Cardoza v. Healthfirst, Inc., 210 F.Supp.2d 224 (S.D.N.Y. 1999).
- In addition to applying to disparate treatment claims under Title VII, the McDonnell Douglas test also applies to retaliation claims under Title VII. See Rafael v. Conn. Dep't of Children & Families, 2017 WL 27393 (D. Conn. Jan. 3, 2017). Its reach is universally applied in this field. See Quaintance v. City of Columbia, 2018 WL 264177 (W.D. Mo. Jan. 2, 2018) (Plaintiff failed to make *prima facie* showing under McDonnell Douglas of discrimination under the ADA, or discrimination or retaliation under Title VII, and therefore summary judgment granted to Defendant). See also Murray v. Cerebal Palsy Assoc. of N.Y., Inc., 2018 WL 264112 (S.D.N.Y. Jan. 2, 2018).

20

Federal & NY – Same Standard*

- Claims under New York's Human Rights Law are governed by the same standards of recovery as under Federal Title VII.
- This includes application of the McDonnell Douglas test. See James v. City of New York, 144 A.D.3d 466, 41 N.Y.S.3d 221 (1st Dep't 2016) (plaintiff claimed discrimination in the workplace based on sexual orientation, under New York City law – again a state and city claim only).*
- "Thus, '[b]ecause both the Human Rights Law and title VII address the same type of discrimination, afford victims similar forms of redress, are textually similar and ultimately employ the same standards of recovery, federal case law in this area also proves helpful to the resolution of this appeal'… Further, the human rights provisions of the New York City Administrative Code mirror the provisions of the Executive Law and should therefore be analyzed according to the same standards." Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 390 n.3 (2004) (citing Matter of Aurecchione v. New York State Div. of Human Rights, 98 N.Y.2d 21, 26 (2002) (citation omitted)).
- See also Schiano v. Quality Payroll Systems, Inc., 445 F.3d 597 (2d Cir. 2006).

- ***However – Changes Pending in NY – The Amendments eliminate the "severe or pervasive" standard for claims of hostile work environment. Aligns with NYC HRL. Will be unlawful to subject an individual to "inferior terms, conditions or privileges of employment because of the individual's membership" in any protected class under the NYS HRL. No need to show repetitive if it exists. *BUT – affirmative defense will remain – where "harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." So, in a sense maintains the objective and subjective measures.***
- ***In addition – for cases filed on or after the 60th day after NY's Governor signs Amendments, plaintiffs will no longer need to compare themselves to others similarly situated but not belonging to same protected class for employment discrimination claims (i.e. employee violates policy, punished less harshly than others). Will instead be "[n]othing… shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared."***

21

BUT, Different Damages Available

- Under Federal Law – Have the potential ability to recover compensatory damages, back pay, front pay, emotional distress, punitive damages, and attorneys' fees.
- Under NY State Law – Ability to recover compensatory damages, but no punitive damages, and no attorneys' fees in any actions except (as of January 2016) those for discrimination based on sex – and for those, any prevailing party can seek attorneys' fees.*

- ***Changes in NY Law pending here also – Under Amendments, prevailing plaintiff in discrimination, harassment or retaliation claim will be able to recover against a private employer: punitive damages, and "shall" be awarded reasonable attorneys' fees. Before this, discretionary with Court. (Prevailing employer defendant may only receive attorneys' fees from plaintiff if complaint shown to be frivolous.)***

22

Retaliation

- Under both the NY law and federal law, it is a separate violation if an employee suffers an adverse employment action, termination or otherwise, for their having opposed discrimination suffered by another, participated in an investigation, supported the claim of another, or filed a claim on their own behalf.
- Remember – even if the employee's underlying claim of discrimination fails, the employee may still maintain a separate and substantiated claim of retaliation.
- *This includes wrongful actions taken against an employee after an internal complaint, as well.* See Cook v. EmblemHealth Services Company, LLC, 167 A.D.3d 459 (1st Dep't 2018) ("The temporal proximity between plaintiff's complaints to his employer that he was subjected to racial stereotyping and discrimination and the termination of his employment in close succession to his last complaint is sufficient to raise an inference of a causal connection between plaintiff's protected activity and the disadvantaging employment action taken against him").

23

Litigation, Claims, EEOC and DHR

- Federally – United States Department of Labor houses the Equal Employment Opportunity Commission.
- In NYS – Division of Human Rights.
- Filing with one is a joint filing with other. But, the one filed with is the lead agency. There are appeal rights to the other depending on the outcome (*i.e.* if DHR is the lead agency, and the DHR determines no probable cause on the employee's federal law claims, the employee could appeal to the EEOC for review).
  - File within 300 days in EEOC and within 1 year with DHR (***Change Pending - claimants of sexual harassment will have 3 years to file with DHR (1 year after Governor signs law); remains 1 year for other claims of discrimination or harassment***), and within 3 years if in state court on state law claims. *See also recent legislative action, Stop Sexual Harassment in NYC Act, signed into law by Mayor DeBlasio on May 9, 2018, and amending certain timeframes for filing within the City of New York. Now have 3 years, not 1 year, to file with the NYC CHR.*
  - *Failure to file within 300 days of actions that are discrete actions - and not continuing violations - such as failure to promote, results in dismissal of claims as time-barred. See Dacier v. Reardon, 2018 WL 2022610 (N.D.N.Y. Apr. 27, 2018) (Kahn, D.J.).*
  - *Note, though, employee must exhaust administrative remedies and only file in court after receipt of EEOC's Right to Sue letter, or after 180 days of EEOC filing if no agency action (360 days from initial complaint if there are amendments to the EEOC charge). BUT, if an employee files before the 180 days have passed, the District Court is NOT deprived of subject matter jurisdiction, despite 42 U.S.C. §2000e-16(c) and 29 C.F.R. §1614.407(b) being jurisdictional, at least according to one Circuit. A Rule 12(b)(1) motion may fail, but a 12(b)(6) motion might not. See Stewart v. Iancu, 912 F.3d 693 (4th Cir. 2019).*

24

Federal

- Prior to proceeding to a court filing for any **federal** statutory claim under Title VII, ADEA, ADA, EPA or GINA – must exhaust remedies. Must file first with the EEOC as clearing-house. Required by law.
- Cannot proceed until EEOC makes determination, and issues probable cause finding. Or, if the consideration/investigation takes longer than 180 days, the employee/complainant can request that the EEOC just issue a right to sue and allow the case to be withdrawn from EEOC.
- EEOC starts with a filing similar to a complaint in court. Is *ex parte*, EEOC will provide to respondent.
- EEOC then seeks response position statement from employer. Also submitted *ex parte*.
- EEOC will then ask complainant for rebuttal. Employer may not receive this.
- EEOC is empowered to speak with witnesses, make site visits, call the complainant and counsel into the EEOC offices for questioning, etc.

25

Paperwork, Records & Policies

- "Paper can be your friend." Generally speaking – An employer is very much benefitted by maintaining an adequate paper file, including a thorough personnel file, for all employees. If or when claims of discrimination are filed, the employer can immediately turn to the paper file for potentially defensive material.
- Therefore, it is vital that the employer maintain a good filing system, with files maintained on all employees. Retain all copies of signed handbooks and policies, any contracts pertaining to that employee, any non-compete agreements, any non-disclosure agreements, any periodic reviews, write-ups, complaints or disciplines against an employee, as well as any commendations received by the employee (those can also be useful in a litigation). Of course, all record-keeping *must* be done *accurately*.
- Finally, documentation from any meeting with an employee should include the names of all of those present – and management should ensure that at least two persons are present representing the company. A meeting for reprimand or commendation should not be attended by only one manager and the employee.
- The employee should sign all paperwork, and all reviews, write-ups or commendations. If the employee refuses, a note should be made. Of course, if the workplace is unionized, a union representative must accompany the employee, and the CBA will govern the interactions between management and the employee.

26

Remember….

- Membership in a protected class, or a claim made under the law, does not mean that an employee is thereafter immune to workplace rules and job expectations. Protection under the statutes and caselaw does not trump misconduct.
- See Fanelli v. New York, 200 F.Supp.3d 363 (E.D.N.Y. 2016).
- In applying the McDonnell Douglas burden shifting test, and finding in employer's favor, dismissing the case, the Court in part evaluated the proffered, non-discriminatory reasons advanced by the employer for why the employee/plaintiff experienced adverse treatment in the workplace, which plaintiff alleged was close in time to her EEOC filing so as to constitute retaliation.
- The Court accepted the employer/defendant's reasons that the employee had engaged in misconduct, and the employer had begun an investigation prior to the EEOC charge. Plaintiff failed to produce any evidence in rebuttal that another investigation or mistreatment took place after the EEOC charge. And, notation of Internet misconduct/misuse, if included in the employee's review, would have been proper absent evidence that it was against employer policy or was used in a manner inconsistent with how other employees received reviews (plaintiff did not produce such evidence).
- The employer's paperwork and records no doubt aided in the defense.

27

Anti-Harassment and Anti-Discrimination Policies

- These can be stand-alone or incorporated into handbooks.
- Generally, the policies first spell out that the employer is an equal opportunity employer, and that no actions or activities in violation of the law or discriminatory toward any groups will be tolerated.
- The policies can spell out the particular laws.
- The policies then specify the types of activities that are prohibited: sexual harassment, hostile work environment, discrimination based on race or disability. The policies can be as detailed as the employer would like, restricting e-mails of off-color jokes, sexual touching, suggestive language, etc. But it would be good to include language such as "including, but not limited to", or "this list is illustrative, but not exhaustive" so it is clear that examples are not exclusive.
- The policies should then provide avenues that an aggrieved employee can follow – someone to report to, an alternate if the usual person reported to is accused, or unavailable, and a procedure for investigation that is followed.
- The policies should specify that no retaliation will occur against employees who report or make a complaint in good faith, so that there is no fear of reprisal.
- The policies should specify penalties that will exist if someone is found to have violated the policy – this can include a tiered discipline policy, or conditions for immediate termination.
- Obviously, if the employees are unionized, the policy and discipline provisions must be discussed with the union.
- Each employee should be provided with a copy of the policy. They should sign and date, indicating receipt, and that should be kept in the personnel file. The policy can provide that updates may occur at any time, unilaterally. If there are any updates, follow the same procedure, and keep copies of all signed policy iterations in the personnel file.

See Westlaw Practical Law Standard Docs. 5-586-6107(2016), 1-590-0085 (2016)

28

Federal, New York State and New York City: Employer Defenses (*Changes Pending – NYS eliminating*)

- Under Federal law and New York State law (*currently*), in cases of sexual harassment, employers have a potential defense available to them – pursuant to the line of cases stemming from Faragher-Ellerth. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
- "The Faragher/Ellerth defense consists of two elements providing that even if a supervisor's behavior resulted in a tangible employment action against the plaintiff, the employer will not be liable if (1) 'the employer exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior,' and (2) 'the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'… With regard to the first element, the maintenance of a written anti-harassment policy providing a procedure for an employee who is the victim of harassment to report the harassment to the Defendant for investigation satisfies the first element…. 'With regard to the second element, "proof that an employee has unreasonably failed to use the employer's complaint procedure normally suffices to satisfy the employer's burden."'" Green v. Avis Budget Group, Inc., 2017 WL 35452, at *21 (W.D.N.Y. Jan. 4, 2017) (citing, *inter alia*, Ferraro v. Kellwood Co., 440 F.3d 96, 102 (2d Cir. 2006)); Poolt v. Brooks, 38 Misc.3d 1216(A), 967 N.Y.S.2d 869 (Table), 2013 WL 323253 (Sup. Ct. N.Y. County 2013) (providing that a first element is that no adverse action was taken).
- New York City has eliminated the Faragher-Ellerth defense under its local law NYCHRL. Belton v. Lal Chicken, Inc., 138 A.D.3d 609 (1st Dep't 2016). "The NYCHRL imposes strict liability on employers for discriminatory acts of managerial employees." Roberts v. United Parcel Service, Inc., 115 F.Supp.3d 344, 368 (E.D.N.Y. 2015) (citing Garrigan v. Ruby Tuesday, Inc., No. 14-CV-0155, 2014 WL 2134613, at *6 (S.D.N.Y. May 22, 2014); N.Y.C. Admin. Code § 8-107(13)(b)(1)).
- **NYS under Amendments Act would also eliminate in NYSHRL cases – even if employee does not make use of employer's policies and procedures, and complain to employer, no defense to employer under State law.**

29

Managing Internal Complaints

- When the company or a supervisor receives a complaint, there are several best practices that should be followed.
- First, always remember the Faragher-Ellerth defense in the case of sexual harassment claims (See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)) (not much longer in New York). Do not discount an employee's complaint. Take action. Also remember the Vance v. Ball State University, 133 S.Ct. 2434 (2013), decision, and the aiding and abetting provisions of the New York State Human Rights Law. If a supervisor fails to investigate complaints, "turns a blind eye", takes part in the discrimination through silence or constructive approval, or otherwise fails to protect an employee's rights, the company and that supervisor may face liability.
- Make sure that the person or team appointed to make the investigation is not in any way named or involved in the complaint itself.
- Interviews should be handled discreetly, but thoroughly. Speak to all witnesses.
- Document, document, document. Keep records/notes of interviews, investigation avenues, and findings.
- Meet with the complaining employee, and keep them apprised of the final decision of the company. Never meet one-on-one, and always have at least two managers/company representatives present.
- If their complaint is determined to be unfounded, explain whether the employee has any internal appeal routes.
- Of course, if the workplace is unionized, the union representatives should be kept apprised, and the CBA should be followed concerning any grievance procedures and appeals.
- Remember that retaliation can be the basis for a separate lawsuit, even if the discrimination complaint is unfounded or baseless. Therefore, inform all supervisors and managers that they are to treat all employees and all investigations with respect, regardless of their feelings concerning the subject of the complaint, or about the person making the complaint.

30

III. Sexual Orientation – New York & Federal

- Provides much more expansive protections than federal law. For example, New York State and New York City laws create protected classes of sexual orientation. Until recently, gender identity was not protected across New York State. See Roberts v. United Parcel Service, Inc., 115 F.Supp.3d 344, 367 (E.D.N.Y. 2015) (citing American Civil Liberties Union, *Non-Discrimination Laws: State by State Information—Map,* https://www.aclu. org/map/non-discrimination-laws-statestate-information-map).
- New York Governor Andrew Cuomo was the first to issue statewide regulations to prohibit harassment and discrimination on the basis of gender identity, transgender status or gender dysphoria – regulations through the N.Y. DHR. The New York City CHR had done so, as well.
- Federal law across the entirety of the United States does not protect those categories or classes, though.
- Just recently the EEOC tried again to bring a claim under Title VII based on sexual orientation. It was initially rebuffed by the Seventh Circuit Court of Appeals. See Hively v. Ivy Tech Comm. College, South Bend, 830 F.3d 698 (7th Cir. 2016). HOWEVER, that decision was vacated in October 2016 when the Seventh Circuit voted to rehear the case *en banc*. A new decision was just recently issued – **853 F.3d 339 (7th Cir. 2017) (*en banc*)** – the first to hold Title VII does protect sexual orientation – a bellwether on this front.

31

Then…

- The Second Circuit issued its decision in **Christiansen v. Omnicom Group, Inc., 852 F.3d 195 (2d Cir. 2017).** The Court was not as wide-sweeping as the 7th Circuit, but rather addressed claims as under gender stereotyping. The concurrence spoke strongly about expanding protections for sexual orientation.
- But then: **Philpott v. New York, 252 F.Supp.3d 313 (S.D.N.Y. 2017) (Hellerstein, D.J.)** (citing Videckis v. Pepperdine Univ., 150 F.Supp.3d 1151, 1159 (C.D. Cal. 2015) (collecting cases) ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct")). Court further held: "The law with respect to this legal question is clearly in a state of flux, and the Second Circuit, or perhaps the Supreme Court, may return to this question soon. In light of the evolving state of the law, dismissal of plaintiff's Title VII claim is improper."
- Otherwise, federal courts had almost universally refused to hold that discrimination based on sexual orientation is really discrimination based on sex/gender, or that sexual orientation discrimination is or should be included under Title VII given EEOC decisions pushing for same. See Hinton v. Virginia Union Univ., 185 F.Supp.3d 807 (E.D. Va. 2016). Cf. Roberts v. United Parcel Service, Inc., 115 F.Supp.3d 344, 362-363 (E.D.N.Y. 2015) (Court, following exhaustive review and looking at EEOC determination, held that there was sufficient evidence for the jury to consider the sexual orientation discrimination and retaliation claims, including under New York City law).
- **The Second Circuit, after granting a rehearing *en banc*, agreed with the 7th Circuit in a decision issued in February 2018. *See* Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. 2018).**

32

Also Recently,

- U.S. District Court in Southern District of Ohio seemed to cite Philpott with approval, but was ultimately constrained by 6th Circuit precedent.
- See Grimsley v. American Showa, Inc., 2017 WL 3605440 (S.D. Ohio Aug. 21, 2017) ("Plaintiff maintains, however, that heterosexuality is the most central of gender norms, based on the presumption that he should be attracted to women, not men. According to Plaintiff, because sexual orientation is inherently a 'sex-based consideration,' an allegation of discrimination based on sexual orientation is an allegation of sex discrimination under Title VII. This view has been adopted by the EEOC and, recently, by the Seventh Circuit Court of Appeals…. None of this authority is binding in the Sixth Circuit, however. Earlier this year, the Sixth Circuit acknowledged that there may be a sea change underway in this area of the law…. The court also acknowledged that it is difficult to discern 'the line between discrimination based on gender-non-conforming characteristics that supports a sex-stereotyping claim and discrimination based on sexual orientation.'… Nevertheless, the court pointed out that one panel of the court cannot overrule the decision of another panel. Vickers remains controlling law until overruled by the Sixth Circuit sitting *en banc*, or until the United States Supreme Court issues a contrary ruling") (citing Baldwin v. Foxx, E.E.O.C. Doc. No. 0120133080, 2015 WL 4397641 (July 15, 2015); Hively v. Ivy Tech Cmty. Coll.; Philpott v. New York; Tumminello v. Father Ryan High Sch., Inc., 678 Fed.Appx. 281, 285 n.1 (6th Cir. 2017)).

33

- *The U.S. Supreme Court recently declined to hear an appeal of an 11th Circuit decision holding Title VII does not protect against discrimination on the basis of sexual orientation. Evans v. Georgia Regional Hosp., 138 S.Ct. 557 (Mem) (2017).*
- *The 11th Circuit also held in another recent case that Title VII does not protect sexual orientation.* Bostock v. Clayton County, Georgia. *That case is on appeal to the U.S. Supreme Court now.*
- *The EEOC is using* Zarda *in support of its most recent arguments in the 8th Circuit –* Horton v. Midwest Geriatric Mgmt., LLC.
- Zarda *is on appeal to the Supreme Court from the 2d Circuit.*
- **So, we now have a clear circuit split, two opposing decisions on appeal before the Supreme Court, and now we have a full Supreme Court of 9 justices. We will see what the Supreme Court does in the next decision.**

34

IV. Federal Family Medical Leave Act ("FMLA")

- "The FMLA applies to all:

  public agencies, including local, State, and Federal employers, and local education agencies (schools); and

  private sector employers who employ 50 or more employees for at least 20 workweeks in the current or preceding calendar year – including joint employers and successors of covered employers."

- "In order to be eligible to take leave under the FMLA, an employee must:

  work for a covered employer;

  have worked 1,250 hours during the 12 months prior to the start of leave; (special hours of service rules apply to airline flight crew members)

  work at a location where the employer has 50 or more employees within 75 miles; and

  have worked for the employer for 12 months. The 12 months of employment are not required to be consecutive in order for the employee to qualify for FMLA leave. In general, only employment within seven years is counted unless the break in service is (1) due to an employee's fulfillment of military obligations, or (2) governed by a collective bargaining agreement or other written agreement."

See https://www.dol.gov/whd/fmla/fmla-faqs.htm

35

FMLA

- Note: Paid leave and unpaid leave do not count in the 1,250 hours calculation for eligibility.

- FMLA leave is unpaid, but employee can elect or employer can require employee to take paid time off during the same period. Leave should be governed by the employer's policy. BUT, if paid leave time used for FMLA leave, the leave time is still protected FMLA leave.

36

FMLA

- "A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid, job-protected leave in a 12 month period for one or more of the following reasons:

  for the birth of a son or daughter, and to bond with the newborn child;

  for the placement with the employee of a child for adoption or foster care, and to bond with that child;

  to care for an immediate family member (spouse, child, or parent – but not a parent "in-law") with a serious health condition;

  to take medical leave when the employee is unable to work because of a serious health condition; or

  for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or call to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces."
- "The FMLA also allows eligible employees to take up to 26 workweeks of unpaid, job-protected leave in a 'single 12-month period' to care for a covered servicemember with a serious injury or illness."
- See https://www.dol.gov/whd/fmla/fmla-faqs.htm

37

FMLA

- An employee who has recurrent issues, or requires periodic medical care, or has periodic family matters, all of which qualify for FMLA leave, may then qualify for Intermittent FMLA, which means the 12 workweeks of leave may be taken periodically, rather than all at once.
- Concerning recertification – check the regulations governing the specific circumstances. Generally an employer cannot ask for recertification by an employee more often than every 30 days.

38

- The employee must notify the employer, and complete and return appropriate and specific paperwork and forms, with medical physician documentation, to request FMLA leave. If the reason and documentation provided is not sufficient, or not qualifying, the leave may be denied.
- The employee bears the burden of demonstrating entitlement to leave, and providing necessary information, including anticipated timing and duration of qualifying condition and leave – as part of the Certification for FMLA. Absent that, employee has not sufficiently submitted for FMLA leave, and there is no claim. *See* Horsting v. St. John's Riverside Hosp., 2018 WL 1918617 (S.D.N.Y. Apr. 18, 2018) (Seibel, D.J.).
- But see Coutard v. Mun. Credit Union, 848 F.3d 102 (2d Cir. 2017) (employer has obligation to obtain/request more information if needed).
- While the paperwork and forms should be done before the leave is taken, if the leave is due to a sudden medical emergency, or accident, then the paperwork should be completed as soon as possible thereafter.

39

FMLA – Return to Work Protections

- "On return from FMLA leave (whether after a block of leave or an instance of intermittent leave), the FMLA requires that the employer return the employee to the same job, or one that is nearly identical (equivalent).
- If not returned to the same job, a nearly identical job must:

  offer the same shift or general work schedule, and be at a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance);

  involve the same or substantially similar duties, responsibilities, and status;

  include the same general level of skill, effort, responsibility and authority;

  offer identical pay, including equivalent premium pay, overtime and bonus opportunities, profit-sharing, or other payments, and any unconditional pay increases that occurred during FMLA leave; and

  offer identical benefits (such as life insurance, health insurance, disability insurance, sick leave, vacation, educational benefits, pensions, etc.)."

See https://www.dol.gov/whd/fmla/fmla-faqs.htm

40

FMLA

- Important for employers to understand that the leave is a "protected" leave – which means that when the leave period is over, an employee must be allowed to return to their same job (or a comparable job) with the same pay and benefits, and seniority, so long as the employee can perform the essential functions with or without a reasonable accommodation. The protections of the ADA and State HRL still apply.

41

V. New York's Paid Family Medical Leave – A New Era

- A new era has begun in New York – not one created by the presidential election, but rather one created by the votes of the State Assembly and Senate, and the stroke of the Governor's pen. As of March 2016 New York State passed a law creating paid family leave. In doing so, New York joins only a handful of other states that have blazed this path – a path that has met with little success in the United States Congress.

- Ultimately, the New York law will provide employees with up to twelve (12) weeks of paid leave from their jobs. Before this, the federal Family Medical Leave Act provided for twelve (12) weeks of unpaid leave, during which time an employee's job and seniority were protected – but, as discussed above, the federal FMLA had limited reach. *Federal FMLA also allows for an employee's own health issues, whereas NY Paid Leave **does not** – employer policies and existing policies will govern.*

42

NY Paid Leave

- Once fully implemented, New York workers will be covered if they have worked for an employer (large or small) regularly scheduled to work 20 hours or more per week for at least 26 weeks, regardless of whether they are full- or part-time employees. Scheduled for less than 20 hours per week? – Employee becomes eligible after 175 days of work. Employers who have at least 1 employee on each of at least 30 days in a calendar year must provide the leave.
- Those who qualify for leave may take the leave upon the birth or adoption of a child, or to care for an ill family member. There is also the potential that leave can be used when a spouse is called to military service if there are other familial obligations in the home. The paid leave law will apply to male and female employees. *FMLA & Paid Leave can be aggregated if qualified.*
- The leave is funded by a payroll deduction taken from employee paychecks – and there is no contribution by an employer (although employers can elect to pay it). While even when fully implemented, in 2021, an employee will not receive a full paycheck during the leave period, the employee will receive up to 67-percent of the State's average weekly wage.

43

NY Paid Leave

- Employees can now take paid leave (up to 8 weeks), if qualified and for qualifying reasons, in 2018. The law then phases-in to full effect by 2021.
- The most important thing for employers to understand is that the leave is a "protected" leave – which means that when the leave period is over, an employee must be allowed to return to their same job (or a comparable job) with the same pay and benefits, and seniority – similar to federal FMLA.

44

VI. Americans with Disabilities Act ("ADA")

- According to the EEOC: "The Americans with Disabilities Act gives civil rights protections to individuals with disabilities similar to those provided to individuals on the basis of race, color, sex, national origin, age, and religion. It guarantees equal opportunity for individuals with disabilities in public accommodations, employment, transportation, State and local government services, and telecommunications."
- https://www.ada.gov/q&aeng02.htm
- The New York State Human Rights Law and New York City Human Rights Law also provide protections for those who have qualifying disabilities.

45

To Qualify:

- As of 1992, employers of 25 or more were covered. Now, as of 1994, employers of **15 or more employees** are covered by the ADA.
- "The ADA prohibits discrimination in all employment practices, including job application procedures, hiring, firing, advancement, compensation, training, and other terms, conditions, and privileges of employment. It applies to recruitment, advertising, tenure, layoff, leave, fringe benefits, and all other employment-related activities."
- https://www.ada.gov/q&aeng02.htm

46

ADA

- According to the EEOC: "Employment discrimination is prohibited against 'qualified individuals with disabilities.' This includes applicants for employment and employees. An individual is considered to have a 'disability' if s/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected."
- "The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered."
- "The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness."
- "The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the 'negative reactions' of customers or co-workers."
- https://www.ada.gov/q&aeng02.htm

47

ADA Amendments Act of 2008

- "The Americans with Disabilities Act (ADA) was amended by the ADA Amendments Act of 2008 (ADA Amendments Act) to clarify the meaning and interpretation of the definition of 'disability'. The ADA Amendments Act was signed on September 25, 2008, and took effect on January 1, 2009."
- See https://www.ada.gov/regs2016/adaaa_qa.html

48

ADA Amendments Act of 2008

- "Congress passed the ADA Amendments Act to remedy the effects of several Supreme Court decisions that narrowly interpreted the ADA's definition of 'disability'. These narrow interpretations resulted in the denial of the ADA's protection for many individuals with impairments that Congress intended to cover under the law, such as cancer, diabetes, and epilepsy. The ADA Amendments Act provides clear direction about what 'disability' means under the ADA and how it should be interpreted so that covered individuals seeking the protection of the ADA can establish that they have a disability."
- https://www.ada.gov/regs2016/adaaa_qa.html

49

What is a "Reasonable Accommodation"?

- The EEOC defines this as "any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities."
- https://www.ada.gov/q&aeng02.htm
- May include accommodations for those employees suffering from depression. See Klein & Pappas, *Reasonable Accommodations for Employees Suffering from Depression*, N.Y.L.J. at p. 3 (Dec. 5, 2018).

50

Compare with a Reasonable Modification

- A Reasonable Modification is sometimes included under the heading of Reasonable Accommodation.
- Note, though, that sometimes they refer to separate items.
- A reasonable modification may refer to a physical alteration, construction, etc., affecting a dwelling/housing, building or workplace, while a reasonable accommodation may refer to a change in work conditions, job assignment, duties, hours, etc.

51

Interactive Process

- When an employee approaches the employer's representative concerning a qualifying disability, or when the employer believes that an employee has a qualifying disability that concerns the workplace, the employer and employee must engage in what is called the "interactive process".
- The employee will have to identify a reasonable accommodation allowing them to perform essential job functions. Absent that, ADA claim will fail. See Schmeichel v. Installed Bldg. Prods., LLC, 2018 WL 6171750 (W.D.N.Y. Nov. 26, 2018).
- The employer and employee should discuss the needs of the employer and employee, and what if any reasonable accommodation(s) could allow the employee to continue to perform his or her essential job functions.
- If the employer fails to engage in the interactive process, and thereafter discharges the employee by stating that the employer has no jobs that the employee could continue to perform, the employee might use that as a basis to show discriminatory animus in a discrimination lawsuit.
- If the employee refuses the interactive process, and states that no accommodation is necessary, the employer should document everything (see "paperwork is your friend" later in these materials). If the employee does not perform their essential job functions as required, is a danger to others, or commits misconduct, the employer upon properly documenting all issues may be able to discharge the employee.

52

Training

- ***Training of employees and supervisors is of vital importance. Supervisors and decision-makers must be aware that their decisions and liability for the employer hinge on how they address known conditions. This does not excuse failure to engage in the interactive process, however. Remember that is also required. Simply put – decisions must be made in a legal, non-discriminatory, non-pretextual way.***
- Also remember, though, that "[u]nder Second Circuit law, a plaintiff alleging discrimination on account of his protected status must offer evidence that a decision-maker was personally aware of his protected status to establish a *prima facie* case of discrimination…. In order to avoid summary judgment, therefore, Plaintiff must do more than offer evidence that someone at HR knew he had [protected status] before he was suspended and terminated. He must offer some evidence that either Ms. [ ] or Ms. [ ] knew he had [the particular protected status/condition] before they decided to suspend him, and that either Ms. [ ], Ms. [ ], or Mr. [ ] knew he had [the particular protected status/condition] before they decided to terminate him."
- **Murray v. Cerebal Palsy Assoc. of N.Y., Inc., 2018 WL 264112 (S.D.N.Y. Jan. 2, 2018)** (citing Woodman v. WWOR-TV, Inc., 411 F.3d 69, 87–88 (2d Cir. 2005) ("To defeat summary judgment, [plaintiff] was obliged to do more than produce evidence that someone at [the employer] knew her age. She was obliged to offer evidence indicating that persons who actually participated in her termination decision had such knowledge"); Lambert v. McCann Erickson, 543 F. Supp. 2d 265, 278 n. 12 (S.D.N.Y. 2008) ("[A] plaintiff must offer evidence that a decision-maker was aware of her protected status to establish a prima facie case of discrimination")).

53

Two Notes for Thoughts

1. Protection under the ADA is like a parabola.
2. The "Bermuda Triangle" of disability and benefits laws.

54

What about Websites?? Does your website have to be ADA Compliant?

- Is it a violation of Title III of the ADA if someone with a disability is not able to utilize your website in the same fashion as someone without a disability?
- Well – at the moment it depends on what jurisdiction you are in, and whether you have a brick-and-mortar physical location, or a purely online business.

55

VII. Now – Some Problems/Scenarios to Consider and Discuss:

56

Hypothetical #1 – Refusal of Service to a Customer

- You operate a business in the wedding industry, and a customer comes in requesting your services for their wedding.
- You say "very well, let's discuss your plans."
- You then determine that the wedding will be of two same-sex partners.
- You advise the customer that this is against your religious beliefs, and you will not accept their wedding business. However, if they wish to have some other business services, you will provide those separate from anything specifically involved with or supporting the same-sex wedding.
- The client/customer declines, and then brings suit against you for discrimination.
- What result?

57

- **Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, --- U.S. ---, 138 S.Ct. 1719 (June 4, 2018) (Kennedy, J.).**
- Did not address First Amendment rights broadly, and focused instead on narrowly ruling for the Cakeshop on First Amendment free exercise grounds – protection of religious beliefs against open hostility.
- Court's majority decision is a surgical exercise. The rights of gays and lesbians can be exercised on equal terms to others, and are accorded great respect, but so are the religious and philosophical objections to gay marriage. However, those objections cannot be the basis of denial of services and equal access to services and goods under neutral public accommodations law. But, the Colorado Commission did not comply with requirement for religious neutrality in its assessment of the baker's objections.
- Court's majority made clear the decision was for this case only, and future cases would have to be resolved with further elaboration, and "tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."
- Justices Breyer & Kagan concurred; Justices Ginsburg & Sotomayor dissented.
- Court briefly addressed, and pushed aside, the idea of wedding cakes as art and pure speech. Only the concurrence of Justices Thomas & Gorsuch accepted that path – possibly because the others wished to avoid strict scrutiny protection for opponents of same-sex marriage, and those who might discriminate. *See* Mauro, *In 'Masterpiece' Case, Why Did SCOTUS Snub Wedding Cakes as Art?*, N.Y.L.J. at 2 (June 7, 2018).
- **Therefore, the case has limited application to future cases – BUT, indicates that the Court will not be receptive to decisions of lower tribunals that appear to be clearly hostile to religious beliefs when those beliefs, "based on sincere religious… convictions", are proffered as the basis for denial of services (as the Court held was the case with the Colorado Commission).**

58

Hypothetical 2 – Medical Marijuana

- **Marijuana use**. An automatic strike against an employee, right?
- Not necessarily.
- Interplay of federal and state laws. This is where there is some uniqueness to our federalist system. While the federal government has ultimate authority over those areas specified in Articles I and II of the Constitution, the Tenth and Eleventh Amendments reserve powers to the States, as well.
- Under Federal law, marijuana possession, even if used for medical purposes, is still viewed as a crime. The Federal government and agencies will not acknowledge any medical benefit. However, NY (and a number of other states) now permits medical use of marijuana – by statute, Compassionate Care Act.

59

Federal Law

- If an employee tests positive for marijuana, even if used for medical purposes, that employee may be terminated for violating drug policies.
- There is no protection under the ADA. There is no acknowledged disability. Federal law does not recognize drug use, if illegal under federal law, as a reasonable accommodation.

60

Garcia v. Tractor Supply Co., 154 F.Supp.3d 1225 (D. NM. 2016) (appeal dismissed, 10th Cir., Case No. 16-2020 (Mar. 25, 2016))

- An employee suffering from HIV/AIDS was using medical marijuana.
- New Mexico had Compassionate Use Act. HIV/AIDS qualified as a serious medical condition under the New Mexico Human Rights Act.
- Garcia was promoted, reported for drug test, which he failed, and was fired.
- Argument was Garcia not fired because of HIV/AIDS. Marijuana use not manifestation of HIV/AIDS. Marijuana use for relief from HIV/AIDS did not convert the misconduct.
- The Court stated: "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 [federal] Controlled Substances Act preempts New Mexico state law."
- The Court evaluated cases from other states on the same or similar issues.
- While state laws may exempt medical marijuana users from state prosecution, they do not protect users from federal prosecution, nor can they require that employers accommodate something that federal law expressly prohibits.
- See also Lambdin v. Marriott Resorts Hospitality Corp., 2017 WL 4079718 (D. HI Sept. 14, 2017) (on appeal as of Dec. 1, 2017) (citing Garcia; granting defendant summary judgment under both the ADA and Hawaii state law – because Hawaii had also adopted McDonnell Douglas burden shifting under state law).

61

BUT… There has been a shift

- Some jurisdictions becoming a little more employee-friendly on this issue.
- Massachusetts: Barbuto v. Advantage Sales & Mkting., LLC, 477 Mass. 456 (2017). Plaintiff, suffering from Crohn's Disease and irritable bowel syndrome, was told that her medical use of marijuana at home would not be an issue. She did not use at work, and did not come to work under the influence. If the medication prescribed is against an employer's policy, the employer has duty to engage in interactive process to identify alternative. IF there is no equally effective alternative, the employer has the burden of showing the employee's use of the medication creates an undue hardship to the business to justify refusal of an exception to the policy.
- Employer argued marijuana illegal under federal law, so no need to accommodate.
- Supreme Judicial Court held that does not make it per se unreasonable as accommodation. No protection for use at work. But, if not at work, other considerations. Need to engage in interactive process, or may run afoul of the state act.

62

And, also…

- Connecticut: Noffsinger v. SSC Niantic Operating Co., LLC, 273 F.Supp.3d 526 (D. Conn. 2017).
- Plaintiff prospective employee brought suit for discrimination in state court. Employer removed to federal court.
- State law (Connecticut Palliative Use of Marijuana Act) not preempted by any federal law, including the Controlled Substances Act and Americans with Disabilities Act. Provision in state law prohibiting employers from discriminating against authorized users upheld.
- Private right of action created by Connecticut PUMA.
- Employer's motion to dismiss action denied in large part. Employee or prospective employee using marijuana in accordance with state law can maintain an action against an employer for discrimination.

63

Matter of Semantics?

- Courts have been splitting hairs to make a distinction between State laws that permit dispensing and use of medical marijuana, and the Federal Controlled Substances Act that prohibits drug possession and use for any reason.
- There is a distinction between State laws that permit such use and distribution, thereby prohibiting prosecution under State criminal laws, and State anti-discrimination laws that require employers to accommodate medical marijuana use even if that use violates the Federal law.
- But, now, with the shifting decisions, employers must take care depending on the wording of the state statutes, and the case-specific circumstances of use and the workplace.
- *See and compare* White Mountain Health Ctr., Inc. v. Maricopa County, 386 P.3d 416, 241 Ariz. 230 (Ariz. Ct. Apps. 2016) with Emerald Steel Fabricators, Inc. v. Bureau of Labor & Industries, 348 Or. 159, 230 P.3d 518 (2010).

64

In New York – Compassionate Care Act…

- Specifically grants protections for certified patients, under the Human Rights Law, as those having a disability.
- Under the CCA, New York employers with 4 or more employees may not discharge or discipline an employee who is a certified marijuana use patient.
- However, according to SHRM*, there are some exceptions: "Significantly, though, the nondiscrimination provision of the Compassionate Care Act sets forth two exceptions: 1) it 'shall not bar enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance;' and 2) it 'shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.' Accordingly, New York employers will still be able to maintain a safe workplace by restricting employees from performing their duties while under the influence of marijuana. For example, employers may still adopt and maintain reasonable policies or procedures – including drug testing – to ensure that an individual is not working while under the influence of a controlled substance (including marijuana) or engaging in the illegal use of drugs. Substance abuse prevention policies should notify employees that the use of controlled substances (including medical marijuana) is prohibited during work hours and that disciplinary action will be taken against anyone who violates that policy." https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/medical-marijuana-legally-available-in-new-york.aspx

  * - Society for Human Resource Management

65

Takeaway…

- Therefore, this is an evolving area. If you have an employee who is a certified patient, and uses medical marijuana, and tests positive for it, an accommodation may be necessary under the State Human Rights Law (and New York City Human Rights Law) – unless same would jeopardize a federal contract, or violate federal regulations that govern the business.
- There are also some other questions – is the employee needing to use the marijuana while on the job? What are the job duties – driver, forklift operator, surgeon, police officer? Perhaps an interactive process discussion will be needed to determine if there are other jobs the person is qualified for, where the marijuana use will not inhibit their abilities to safely complete the essential functions. If not, then protection may not be available if the employee must use marijuana during the workday, and it will affect their job duties. Another issue is whether they test positive but are not "under the influence" ("still in the system").
- If there is a discrimination lawsuit, even if under only state law, plaintiffs should be cautioned that employers may try to remove to federal court, claiming the federal Controlled Substances Act as a defense (as in Garcia); and employers may wish to consider that potential option when evaluating affirmative defenses. Although this is by no means a guarantee of success (Noffisinger).
- This is all highlighted as something to be explored further if you are presented with this scenario.

66

Hypothetical 3 -

Can an employer review an employee's social media page & make employment decisions? Can the employer make hiring decisions? What if an employee, outside of the workplace, takes part in activities that the employer does not believe comport with the values and ideals of the business (*i.e. Charlottesville*)?

67

Well…

Depends. Some would say yes. Watch the laws, and research in the jurisdiction.

N.Y. Labor Law § 201-d – Cannot discriminate or retaliate based on employee's certain "political activities" or "recreational activities". Disputes sometimes over what is included.

What are "recreational activities"? Dating a co-worker? A non-fraternization policy?

NO. Not covered or protected by the statute in that circumstance.

Support of a political candidate? Or, fundraising for a candidate for office? YES, falls under the statute.

Recent article in the NYLJ, as well. *Rights of both parties under Title VII when it comes to issues of speech in Charlottesville?? Discuss.*

68

Scenario 4

- You own a movie theater.
- A patron comes to the theater requesting a tactile interpreter – using American Sign Language – because the patron is both blind and deaf, and the interpreter would allow the disabled patron to experience what sighted and hearing customers could experience.
- Are you required to provide the interpreter under the ADA?

69

Questions:

- Are you a place of public accommodation?
  - ✓ Yes
- Do you need to consider the accommodation?
  - ✓ Yes
- Is the accommodation reasonable?
  - ✓ According to the 3rd Circuit – Yes – Subject to defenses, such as "undue burden".

70

McGann v. Cinemark USA, Inc., 873 F.3d 218 (3d Cir. 2017)

- Plaintiff movie patron was both deaf and blind. Prior to his wife's passing, she interpreted for him. After that, a particular theater plaintiff had attended provided a tactile interpreter. The defendant movie theater in this case was showing a movie that the other theater was no longer showing. The defendant theater chain (having 335 theaters and 4,499 screens across 41 states) did offer services for those with disabilities, but none could accommodate plaintiff's needs.
- The theater argued that it had never received a request for tactile interpreter like Plaintiff's before, and because of the complexity of the movie ("Gone Girl"), two interpreters would be required from the service provider for a minimum of 2 hours each, at a cost of $50-$65/hour, and the request was denied. Plaintiff claimed a violation of Title III of the ADA. After a bench trial, the Chief Magistrate Judge ruled for the theater.
- Via e-mail, Cinemark declined the request and "explained that Cinemark did not believe that the ADA required Cinemark to provide McGann with tactile interpretation services for the purpose of 'describ[ing] the movie [McGann] [would] [be] attending'".
- The U.S. District Court (Kelly, *Chief Magistrate Judge)*, following a bench trial, issued a decision in favor of the theater owner.

71

The Third Circuit

- Stated that: "Title III begins with a '[g]eneral rule' that '[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.'… These general prohibitions include, *inter alia*, denying an individual on the basis of a disability 'the opportunity ... to participate in or benefit from the goods [or] services' of a public accommodation" (citing 42 U.S.C. § 12182(b)(1)(A)(i)).
- There was no dispute that Plaintiff was disabled as per the ADA.
- Further, an ASL tactile interpreter is an auxiliary aid or service, and the tactile interpreter was a qualified interpreter.
- The Court then provided detailed analysis regarding how denial of the interpreter denied plaintiff or excluded plaintiff from defendant's services. But, the Circuit remanded so the district court could consider one of defendant's defenses – "'undue burden' under Title III 'mean[ing] significant difficulty or expense'" (citing 28 C.F.R. § 36.104.). The district court had ruled for defendant on other grounds.
- See also Washington State Communication Access Project v. Regal Cinemas, Inc., 173 Wash.App. 174, 293 P.3d 413 (Wash. Ct. Apps. Div. 1 2013) (issue of movie patron access under state law).

72

Fact Pattern 5 for Discussion

- Your business has employees numbering 150. One of the employees is Latino, and is one of only fifteen Latino employees. One of the "supervisors" makes jokes about Latinos, and insults this employee's Latino heritage, on a daily basis. The employee has lodged a complaint with the human resources office. Following the complaint, the supervisor of the Latino employee, powerless to do anything on his own, wrote-up the employee falsely for violations of company policy and reported that to a higher supervisor who fired the Latino employee.
- What are the issues that are raised in this scenario? What laws are potentially involved? What steps should be taken by you and the business to address the risks that are faced, if any?

73

Scenario 6

- You have a business with twelve (12) employees. A female supervisor is making sexual advances toward and comments to a male subordinate on a weekly basis. The employee lodges a complaint with the human resources office. An investigation was conducted by the company. The female supervisor went to the male subordinate who was being harassed, apologized believing that everyone was joking, and promised no other comments would be made. That male employee has not experienced any harassment or negative treatment since.
- What are the issues that are raised in this scenario? What laws are potentially involved? What steps should be taken by you and the business to address the risks that are faced, if any?

74

Scenario 7

- You have a New York State business, with locations in Rochester, Troy, Peekskill, and Long Island City. You have eighteen (18) employees. A male supervisor is making sexual advances toward and comments to a female subordinate on a weekly basis. The employee does not lodge a complaint, there is thus no investigation conducted by the company. The female employee thereafter files a charge with the EEOC. After 172 days of waiting for the EEOC to render a determination, she files suit in New York State Supreme Court, under Title VII (federal) and NYS HRL. Your company had a clear policy and procedure for sexual harassment complaints. The company also has a policy concerning mandatory arbitration of such complaints.
- What are the issues that are raised in this scenario? What laws are potentially involved? What steps should be taken by you and the business to address the risks that are faced, if any? What motions can you make, if any? What do you do?

75

Last Scenario

- You are in a business with twenty-five (25) employees. The department manager, who has the authority to hire and fire employees, is overheard making jokes about a co-worker's sexual orientation.
- What legal liability do you face? What should you do as the manager/owner?

76