

2019



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For copies of the 2019 Employment Law Update presentations, visit [SmithLaw.com/elu2019](http://SmithLaw.com/elu2019)

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## PROGRAM AGENDA

<b>8:30 – 9:00</b>	<p><b>Registration and Breakfast</b> <i>Complimentary breakfast</i></p>
<b>9:00 – 9:05</b>	<p><b>Welcome and Introduction</b> <i>J. Travis Hockaday</i></p>
<b>9:05 – 9:55</b>	<p><b><u>Boomers, Bots and Gen Z</u></b> <i>Kimberly J. Korando and Taylor M. Dewberry</i></p> <p>Gen Z is coming, the robots and AI are here, and the boomers aren't retiring yet. Risks, rewards and challenges abound for HR, business leaders and corporate counsel. Join us for a review of research insights, best practices and what thought leaders are saying about what makes Gen Z tick (and how they differ from Millennials), how HR will be deconstructing and reinventing jobs in the IOT world, why corporate initiatives to attract and retain boomers is a thing, and how to leverage this most interesting evolution of workforce diversity.</p>
<b>9:55 – 10:35</b>	<p><b><u>Recognizing and Avoiding Common Pitfalls Under the FLSA</u></b> <i>Susan M. Parrott and Kerry A. Shad</i></p> <p>This session will highlight some of the most common mistakes employers make in applying wage and hour laws—classifying workers, quantifying work time, and calculating overtime—and give you the analytical framework to avoid potentially expensive mistakes. In addition, we will discuss the new overtime rule, recent DOL guidance, and recent cases.</p>
<b>10:35 – 10:45</b>	<p><b>Morning Break</b></p>
<b>10:45 – 11:30</b>	<p><b><u>When Work and Employee Health Intersect: Key Issues under Federal and State Disability and Leave Laws</u></b> <i>Rosemary G. Kenyon</i></p> <p>This session will review recent case law about common employer challenges under federal and state disability and leave laws and will provide guidance to employers on their obligations to employees with health issues, including the latest on making medical inquiries, addressing accommodation requests, managing attendance, complying with evolving state leave laws, and more, with practical tips on avoiding liability and resolving problems in the workplace.</p>
<b>11:30 – 12:15</b>	<p><b><u>Panel Discussion - Hot Topics in Employment Law</u></b> <i>Sarah W. Fox, Moderator</i> <i>Panel Members - Jenny E. Bobbitt, Kara M. Brunk, Taylor M. Dewberry, Rosemary G. Kenyon, Kimberly J. Korando and Kerry A. Shad</i></p> <p>A panel of our veteran employment and benefits lawyers will discuss a number of timely topics for employers, including the latest on unlimited PTO, the Affordable Care Act, disciplinary action for social media activity, alcohol in the workplace, the NLRB handbook rules, and use of marijuana/CBD products by employees.</p>
<b>12:15 – 1:05</b>	<p><b>Lunch</b> <i>Complimentary Lunch</i></p> <p><b><u>Preventing and Addressing Workplace Violence</u></b> <i>Kristine Correll, Training Manager, Sunstates Security, LLC, J. Travis Hockaday</i></p> <p>This session will focus on identifying key behaviors and warning signs of potential workplace violence, understanding how to manage aggressive workplace behavior before it escalates, and best practices for mitigating risks of violence in connection with terminations and other disciplinary actions.</p>

1:05 – 1:25	<p><b><u>Post-Lunch Surprise</u></b>  <i>Kerry A. Shad and Taylor M. Dewberry</i></p> <p>After lunch, we will treat you to a short and entertaining session to get you ready for the afternoon.</p>
1:25 – 2:05	<p><b><u>A Lie Can Travel Halfway around the World, while the Truth is Still Putting on Its Shoes</u></b>  <i>Clifton L. Brinson and Christopher G. Smith</i></p> <p>A current or former employee says something mean, nasty, and false about your company. And they are telling the whole world on social media, while hiding behind an anonymous internet identity. What do you do? In this session, we will take you through the process of what happens when your company gets defamed online.</p>
2:05 – 2:10	<p><b>Transition to Breakout Sessions</b></p>
2:10 – 2:55	<p><b>Concurrent Breakout Sessions</b> (<i>choose one</i>)</p> <p><b><u>Session A: Mission Possible: Conducting Effective Workplace Investigations</u></b>  <i>Sarah W. Fox</i></p> <p>During the last year, the #MeToo movement has had a significant impact on the rise of harassment and retaliation charges filed with the EEOC. Conducting an effective workplace investigation is a crucial tool when complaints of this nature arise in your company. In this breakout session, we will have an opportunity to review core principles of when, why and how to conduct a truly effective investigation.</p> <p><b><u>Session B: OSHA Hot Topics and Trends: 2019 and Beyond</u></b>  <i>Stephen T. Parascandola</i></p> <p>The top 10 most commonly cited violations; dealing with the increase in “whistleblower” complaints; OSHA penalties on the rise again; overlapping OSHA liability with subcontractors and temps; best ways to conduct post-incident drug testing; and a new law governing indoor workplace heat stress. These and other hot OSHA topics will be discussed during this session.</p>
2:55 – 3:05	<p><b>Afternoon Break</b></p>
3:05 – 3:40	<p><b><u>Election Year Challenges for Employers</u></b>  <i>J. Travis Hockaday</i></p> <p>In election years, employers often face challenges in dealing with political discussions in the workplace, and many times, these discussions involve hot-button social and religious topics. 2020 will be one of those years. During this session, we will take a close look at the bounds of employees’ and employers’ rights to introduce political (and social and religious) issues into the work environment and their rights to discourage or minimize the same, with specific reference to the First Amendment, the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, and state-specific laws.</p>
3:40 – 4:20	<p><b><u>EEO Update</u></b>  <i>Zebulon D. Anderson</i></p> <p>A discussion of EEOC enforcement trends and plans, as well as select cases representative of recent trends in EEO litigation.</p>
4:20	<p><b>Adjournment</b></p>

# WHO WE ARE

## WHO WE ARE

### PRACTICE GROUPS

#### EMPLOYMENT, LABOR AND HUMAN RESOURCES

The intersection of business, employment matters and the law is complex and often difficult to navigate. We approach this challenge in an effort to gain a thorough understanding of your culture and objectives. We bring a deep understanding of the law and a wealth of experience regarding its real-world application. We pride ourselves on being a vital and trusted adviser for our clients, offering responsiveness, keen insights, good judgment and a practical, solution-oriented perspective. Our employment, labor and human resources lawyers have received significant client, peer and business community recognition in such prestigious publications and ranking lists as *Chambers USA: America's Leading Business Lawyers*, *The Best Lawyers in America*<sup>®</sup>, *U.S. News – Best Lawyers*<sup>®</sup> “Best Law Firms” and *Martindale-Hubbel*<sup>®</sup>.

Our experience with a wide range of employment, labor and human resources issues enables us to work with our clients to assist them in building and maintaining an employer-of-choice reputation. We do this while minimizing the burden of regulatory requirements and the distractions of regulatory investigations and audits, employee disputes and union organizing. In addition to compliance and risk-management counseling, we develop and conduct training programs for human resources professionals and line managers, offering a range of complimentary compliance-support services. We also host an annual client conference that attracts more than 300 attendees each year.

When employers encounter litigation relating to employment discrimination, wrongful discharge or other employment-related issues, and when complaint investigations and compliance audits arise, we represent them with early risk assessment, dispute resolution services and trial advocacy.

Our clients include a wide range of regional, national and multinational corporations, emerging businesses and regulated industries. We handle employment matters nationwide for many global and publicly traded companies based in North Carolina and have frequently served as the lead employment counsel on some of their most complex, high-level transactions.

We operate as an employment and labor law boutique within a robust, full-service law firm. This affords us ready access to colleagues who focus their practice in such related areas as Employee Benefits and Executive Compensation; Environmental and OSHA; Government Contracts; Data Use, Privacy & Security; Tax; Corporate Governance; Non-Compete and Trade Secrets; and Intellectual Property.

#### Services:

- Wage and hour compliance
- Internal investigations

- Protecting employers: relationships and confidential information (non-competition agreements, trade secret protection)
- Employment-related litigation
- Government investigations, audits and administrative proceedings
- FMLA/ADA/Fitness-for-duty/drug-testing/absence-management program administration
- Workforce restructuring, downsizing, plant closings, merger and acquisition integration
- Executive employment and severance agreements
- Workplace harassment, training and investigations
- Human resources audits and risk management
- Affirmative action plans and OFCCP audits/corporate diversity
- Recruiting, hiring and employee selection
- Human resources policies and employee handbooks
- Workplace violence
- Union avoidance
- Temporary employees, agency staffing, independent contractors and telework programs
- Human Resources and manager training

### **Wage and Hour Compliance**

- Enterprise-wide audits of exempt employee and independent contractor classifications for retail, hospitality, pharmaceutical, technology, distribution and other industry employers and development of strategies for reclassifying misclassified employees in ways to maximize compliance and minimize liability exposure
- Audits of time recording practices relating to donning/doffing, automatic clocking/deductions, and use of remote devices for work and development of practical solutions to maximize compliance and minimize liability exposure
- Enterprise-wide internal compensation analyses, development of processes for enhancing attorney-client privilege protection of analyses and risk management of such analyses
- Successful defense of wage and hour audits and complaint investigations conducted by the federal and state departments of labor involving donning/doffing/overtime, exempt employee classification issues and child labor issues
- Assistance with Service Contract Act issues in unionized and non-unionized settings

### **Internal Investigations**

- Retained as special counsel by hospitals, banks, manufacturers, defense contractors and employers in a variety of industries to conduct internal corporate investigations into allegations of:
  - harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination
  - employee embezzlement
  - kick-backs and favoritism in award of vendor contracts

- procurement fraud in government contract bid by former employee whistleblower and assistance with self-reporting to government
- Retained in connection with allegations against high-ranking corporate officers and to identify root causes of management failures

### **Protecting Employers: Relationships and Confidential Information**

- Drafted confidentiality, non-solicitation and non-competition agreements for global and national employers
- Developed Bring Your Own Device (BYOD) policies and employee social media policies
- Designed exit procedures to maximize protection of company information upon employee departure

### **Government Investigations, Audits and Administrative Proceedings**

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission (EEOC) and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations
  - These investigations have involved EEOC national priority issues, including challenges to enterprise-wide leave policies, criminal records criteria and testing, and have involved non-employee class representatives from advocacy groups
- Retained by employers after conclusion of cause findings for representation during the conciliation process and risk management of potential liability exposure
- Successfully represented federal contractors, including Department of Defense contractors, in connection with Office of Federal Contract Compliance Program (OFCCP) pre- and post-award compliance audits (including corporate management reviews) and complaint investigations. The compliance audits have included inquiries into test validation, staffing agency employees and online recruiting processes and, in some cases, have begun with asserted desk audit liability nearing \$1 million which were subsequently closed without any payment by contractor
- Successfully represented manufacturing, restaurant and hospitality, and retail employers in wage and hour audits and complaint investigations conducted by the federal and state departments of labor throughout the country involving donning/doffing in manufacturing plants, overtime, exempt employee classification and child labor issues, with some involving potential class exposure exceeding \$1 million

### **FMLA/ADA/Fitness for Duty/Drug-Testing/Absence Management Program Administration**

- Led interdisciplinary publicly traded Fortune 500 corporate ADA task force charged with identifying Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and practices including medical testing, qualification standards and test administration accommodation

- Developed and integrated corporate policies for hospitals, banks and pharmaceutical, manufacturing and technology companies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation leave and absence management
- Developed fitness for duty programs including functional capacity testing for manufacturing, healthcare and distribution worksites
- Developed and conducted manager/supervisor ADA/FMLA/absence management training programs
- Reviewed and developed voluntary and mandatory pre-employment, reasonable suspicion and random drug and alcohol testing programs for multistate employers

### **Workforce Restructuring, Downsizing, Plant Closings, Merger and Acquisition Integration**

- Retained by global and publicly traded leading employers to design employee selection and staffing processes, voluntary separation programs, early retirement incentive programs and group termination programs and advise internal corporate task forces charged with such responsibilities
- Developed OWBPA-compliant releases and demographic disclosures, including those involved in complex multisite rollouts over time
- Assisted numerous companies with determining Worker Adjustment and Retraining Notification (WARN) notice requirements and developing WARN notifications
- Conducted internal adverse impact and EEO risk analyses for pre-rollout adjustments, assisted clients in assessing risk and identifying strategies to minimize the risk associated with the proposed actions
- Advised internal corporate teams charged with developing internal and external communications on reorganization activities
- Developed internal processes for enhancing attorney-client privilege protection of reorganization-related corporate documents
- Labor and employment merger and acquisition due diligence

### **Executive Employment and Severance Agreements**

- Negotiated, reviewed and drafted executive employment, non-compete, change in control and severance agreements on behalf of executives and companies

### **Workplace Harassment, Training and Investigations**

- Retained to revise harassment policies and investigation procedures to remedy compliance deficiencies and risk management failures resulting from commonly flawed off-the-shelf policies
- Retained to develop and conduct numerous employee awareness and manager/supervisor training programs or, in some cases, to assist in the evaluation and selection of vendor training programs
- Directed crisis management teams charged with diffusing threats of criminal arrest/prosecution and media disclosure

- Retained as special counsel to conduct internal corporate investigations into allegations of harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination and allegations against high-ranking corporate officers

#### **Human Resources Audits and Risk Management**

- Developed internal process and templates for human resources compliance audits of policies, procedures, practices and records along with processes for enhancing attorney-client privilege protection of audit findings
- Provided advice on options and strategies for handling particular hiring, termination, promotion, reassignment and performance management scenarios, particularly with regard to underperforming employees, employees with health issues and whistleblowers
- Conducted internal adverse impact and EEO risk analyses for pre-reorganization rollout adjustments and internal compensation equity
- Developed and conducted numerous training programs for supervisors on documentation, performance management, discipline and discharge
- Drafted and negotiated numerous severance agreements

#### **Affirmative Action Plans and OFCCP Audits/Corporate Diversity**

- Reviewed, developed and updated numerous Executive Order 11246, VEVRAA and Rehab Act affirmative action plans and advised companies on all aspects of affirmative action, including appropriate statistical analysis for adverse impact calculations
- Successfully represented federal contractors in connection with Office of Federal Contract Compliance Program (OFCCP) pre- and post-award compliance audits (including corporate management reviews) and complaint investigations brought pursuant to Executive Order 11246, Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974
- Successfully defended challenges to test and other selection criteria validation
- Successfully defended class complaints, including those involving non-employee class representatives from advocacy groups
- Provided legal support and general business advice to manufacturers, retail businesses and pharmaceutical companies on establishing workplace diversity programs

#### **Recruiting, Hiring and Employee Selection**

- Advised employers on background and reference checking requirements and procedures, including Fair Credit Reporting Act authorization and disclosure requirements and e-Verify
- Advised employers on validation requirements and procedures for employment tests, physical fitness requirements and other selection criteria
- Assisted employers in virtually every industry with developing recruiting and employee selection processes and documentation procedures

- Developed and presented numerous training programs for supervisors on interviewing and employee selection

### **Human Resources Policies and Employee Handbooks**

- Authored leading North Carolina policy and form book
- Reviewed and developed hundreds of employee handbooks, Human Resources policies and procedures manuals and corporate codes of conduct – many for clients with workforces in multiple states
- Developed Bring Your Own Device (BYOD) and employee social media policies
- Developed harassment/investigation and religious accommodations procedures
- Developed and integrated corporate policies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation, leave for fitness for duty and absence management, and developed corporate leave donation and sharing programs
- Led interdisciplinary corporate ADA task force charged with identifying Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and practices including medical testing, qualification standards, and test administration accommodation; and developing and conducting corporate manager/supervisor compliance training
- Assisted publicly traded companies in financial, healthcare, consulting and manufacturing with developing and implementing corporate record retention and destruction policies
- Advised numerous companies on the legal and practical aspects of transitioning to paperless Human Resources policies

### **Workplace Violence**

- Advised numerous companies on handling specific threats of workplace violence
- Developed and reviewed workplace violence prevention programs and conducted related workplace training
- Served as counsel to employers' multi-disciplinary threat assessment teams

### **Union Avoidance**

- Advised manufacturing and retail companies on handling of specific threats of union organization
- Developed union avoidance programs for global companies and conducted related training

### **Temps, Agency Staffing, Independent Contractors, Telework Programs**

- Advised companies on the legal and practical issues of implementing a telecommuting workforce and individual telecommuting arrangements
- Advised companies on the legal and practical issues of creating an internal temporary workforce

## **Human Resources and Manager Training**

- Developed a comprehensive training institute offering more than 50 programs to human resources professionals, business managers and line supervisors. Topics included ADA, affirmative action, EEO, employee relations, FMLA, harassment, hiring, investigations, policies, union avoidance, workplace violence, and supervisor/manager responsibilities
- Developed highly participatory and mock trial training exercise for Human Resources professionals and investigators for a large global pharmaceutical company in which they experienced first-hand how their decisions and actions played out in front of a jury. The program was customized to the client's policies and workforce
- Developed highly participatory and mock trial training exercise for supervisors in which participants experience first-hand how their decisions and actions play out in front of a jury. The program is customized to client's policy and workforce and has been delivered to employers in a wide range of industries across the country

## EMPLOYEE BENEFITS AND COMPENSATION

The right employee compensation and benefits are critical to recruiting and retaining top employees. But these programs raise complex business, personnel and legal considerations, and they require careful balancing of cost, employee performance and corporate culture. Our lawyers work with clients to help them establish comprehensive long-term plans and to respond effectively to changing conditions and immediate needs.

Our lawyers design, review and implement a wide array of compensation and benefits programs across a full range of industries. We provide counsel regarding the ERISA, tax, securities and accounting considerations applicable to these programs.

Primary Services:

- 401(k) and profit sharing plans
- Employee Stock Ownership Plans (ESOPs)
- Cafeteria plans
- Welfare benefit plans, including group medical plans (insured and self-funded)
- Stock option and stock purchase plans
- Executive compensation
- Incentive plans
- Nonqualified deferred compensation plans
- Severance packages
- Prohibited transaction exemptions

**Qualified Retirement Plans:** We design, review, and implement 401(k) and profit sharing plans, ESOPs and other qualified retirement plans. We assist clients in complying with the ever-changing tax and ERISA requirements applicable to these plans, represent clients in IRS and DOL audits of their plans, and work with clients in structuring corrections for operational and fiduciary errors.

**Welfare Benefit Plans:** We provide similar counsel and representation with respect to cafeteria and other welfare benefit plans and issues, including group medical, life and other insurance coverage, health and dependent care flexible spending accounts, education assistance programs, COBRA and HIPAA.

**Equity Compensation:** We provide stock option and stock purchase plans and assist our clients with the tax, securities and accounting aspects of these plans, including tax reporting and withholding requirements, SEC disclosure and filing requirements, and expensing for financial accounting purposes.

**Executive Compensation:** We negotiate and prepare executive compensation packages for the officers of companies ranging from venture-backed startups to mature, publicly traded companies, and we advise compensation committees and boards of directors in developing appropriate compensation programs for

their companies. Our experience includes structuring equity compensation, deferred compensation, severance, and golden parachute arrangements.

**Mergers and Acquisitions:** We represent acquiring and target companies in corporate transactions and have experience negotiating how compensation and benefits programs will be treated in deals, as well as guiding our clients through the difficult issues that arise post-closing when compensation and benefits programs are eliminated or combined.

**Controversies and ERISA Litigation:** Our ability to provide sophisticated compliance representation is enhanced by our experience with governmental agencies and benefits-related litigation in disputes involving hundreds of millions of dollars in plan assets. We regularly represent large employers in obtaining resolution with the IRS and DOL and have successfully defended employers and fiduciaries in claims ranging from breach of duties to imprudent investing.

**Additional Services:** Our attorneys work closely with other attorneys at Smith Anderson, especially those who practice in the areas of tax, securities, corporate and employment law, so that our clients have the benefit of a comprehensive analysis of the legal issues related to their benefits and compensation programs.

**Our Clients:** Our clients range from emerging growth high-tech and biotech companies located in the Research Triangle Park and throughout the Southeast to major North Carolina banks and public utilities and local and regional manufacturing, retail and services businesses.

**Our Lawyers:** The lawyers in our Employee Benefits and Compensation group have experience counseling and representing clients in all aspects of employee benefits and compensation matters. They actively participate in local and national benefits groups and in the North Carolina and American Bar Associations.

## Zebulon D. Anderson

Attorney

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Zeb Anderson has devoted his career to the representation of private and public employers in connection with all aspects of employment-related litigation. He has represented employers in state and federal courts and before government agencies throughout North Carolina and in other jurisdictions across the country. His experience includes litigation involving employment-related statutory, as well as common law, claims arising under federal and state law and issues that arise when employees leave to join competitors, including non-compete and non-solicitation restrictions, trade secret misappropriation, tortious interference and unfair competition.

## EXPERIENCE

- Since 2000, served as lead counsel in over 100 cases in various industries involving the defense of employment-related claims, including alleged discrimination, harassment, retaliation, wrongful discharge, civil rights violations, labor standards and wage and hour violations, denial of employee benefits and workplace violence
- Served as lead counsel in aviation industry-based class and collective action alleging violation of wage and hour laws in connection with baggage-related tip and service charge practices

## AA CONTACT INFO

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## PRACTICE AREAS

Employment Litigation  
Employment, Labor and Human Resources  
Intellectual Property Litigation  
Litigation  
Non-Compete and Trade Secrets

## BAR & COURT ADMISSIONS

Supreme Court of the United States  
U.S. Court of Appeals for the Fourth Circuit  
U.S. District Courts for the Eastern, Middle, and Western Districts of North Carolina  
All North Carolina State Courts

- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 hours per week violated the FLSA and state law
- Defended employer in the material handling industry that was sued in Florida state court by Fortune 100 company that claimed the employer misappropriated its trade secrets, tortiously interfered with its employee relationships and otherwise unfairly competed with it when the employer hired 19 of its at-will employees over the course of several months
- Defended employer in the entertainment industry and a newly-hired employee who was sued in Michigan state court by a competitor who previously employed that employee and who claimed that the employee breached and the employer tortiously interfered with a non-solicitation agreement after the employee joined the employer
- Represented multiple insurance companies in lawsuits brought in state and federal courts in North Carolina that involved allegations of non-compete and non-solicitation agreement breach by insurance agents who left one company to join a competitor
- Represented medical device distributor in lawsuit filed in federal court in North Carolina that sought to restrain the sales activities of former sales employees who left to join a competitor, but were bound by non-solicitation agreements
- Represented many employers in the health care, pharmaceutical, logistics/transportation and other industries in lawsuits throughout the state and federal courts in North Carolina involving allegations of non-compete and non-solicitation agreement breach, trade secret misappropriation, tortious interference and unfair competition

## EDUCATION

University of Virginia, 1994

- Editorial Board, *Virginia Law Review*, 1992-1994
- Order of the Coif

Duke University, B.A., *magna cum laude*, 1991

- Provided advice and counseling to employers in connection with all aspects of employment law, ranging from EEO issues to non-compete agreements and trade secret protection
- Advised a global financial services technology company on the employment-related aspects of its acquisition of a leading provider of deal analytics and valuation technology

## HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- *The Best Lawyers in America*®, Litigation - Labor and Employment (2016-2020); Employment Law-Management (2018-2020)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2015-2019)
- North Carolina *Super Lawyers* (2012-2019)
- *Business North Carolina's Legal Elite*, Employment (2017)
- North Carolina *Super Lawyers*, Rising Star (2009)
- *Benchmark Litigation*, Labor & Employment Star - South (2019)

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment Section
- Defense Research Institute, Employment Law, Intellectual Property Litigation, and Diversity Committees
- North Carolina Association of Defense Attorneys, Employment and Commercial Litigation Practice Groups

- North Carolina Bar Association, Labor & Employment Section
  - Member, Section Council
- North Carolina Bar Association, Litigation Section
  - Former Member, Section Council
  - Former Editor, *The Litigator*
  - Former Treasurer
- Co-chair, Smith Anderson Lawyer Development Committee
- Member and former co-chair, Smith Anderson Diversity Committee
- Member and former co-chair, Smith Anderson Recruiting Committee
- Wake County Bar Association

## Jenny E. Bobbitt

Attorney

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Jenny Bobbitt joined Smith Anderson's Employment, Labor and Human Resources practice group in 2019. Her practice focuses on counseling clients on employment law issues and the employment aspects of corporate transactions.

Prior to joining Smith Anderson, Jenny was a corporate lawyer in the Louisville office of a regional law firm. Prior to that, Jenny practiced employment law in the Louisville office of a national law firm.

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### HONORS & AWARDS

- Kentucky Super Lawyers – *Rising Stars* (2019)
- Louisville Bar Association Leadership Academy (2019)
- *Louisville Business First* “Young Leaders Award” (2018)
- Staff Editor, *Washington University Jurisprudence Review*
- CALI Excellence for the Future Award – UCC Article 2
- Scholar in Law Award

### PROFESSIONAL & COMMUNITY AFFILIATIONS

- Board of Directors, Restorative Justice Louisville (2017–2019)
- Member, Public Service Committee of Louisville Bar Association (2017-2019)
- Executive Committee, Young Lawyer's Division of Kentucky Bar Association (2018-2019)

### AA CONTACT INFO

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### PRACTICE AREAS

Employment, Labor and Human Resources

### BAR & COURT ADMISSIONS

Kentucky  
Western District of Kentucky  
Eastern District of Kentucky

### EDUCATION

- Washington University in St. Louis School of Law, J.D. with a Certificate in Business Law, 2016
  - Dean's List
- Washington University in St. Louis Olin School of Business, M.B.A., 2016
- Northwestern University, B.A., 2012
  - Dean's List

## Clifton L. Brinson

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Cliff Brinson litigates business disputes. He assists clients with a full range of commercial litigation matters, including corporate and securities litigation, contract disputes, and business-related tort and statutory claims. He also assists companies in internal investigations.

Cliff has successfully taken cases to trial and handled appeals in both federal and state courts, including the North Carolina Business Court. In 2010, Cliff helped a client obtain a \$37 million judgment at trial in a commercial contract case, one of the largest jury verdicts in North Carolina history. The judgment was affirmed unanimously by the Court of Appeals in August 2012, and satisfied in full in September 2012 (\$48.5 million including interest). In 2013, Cliff helped a client obtain a declaratory judgment at trial in another commercial contract case, resulting in cost savings to the client of over \$100 million. Following trial, the court awarded the client over \$1.2 million in fees and costs.

Cliff was previously an attorney in the securities enforcement group at a global law firm in Washington, D.C.

## EXPERIENCE

### Corporate and Securities Litigation

- Defended a private equity firm in shareholder litigation challenging the firm's proposed acquisition

## AA CONTACT INFO

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## PRACTICE AREAS

Appellate Advocacy  
Complex Contract Disputes  
Corporate and Securities Litigation  
Litigation  
Mass Tort and Catastrophic Loss

## BAR & COURT ADMISSIONS

North Carolina  
Numerous federal trial and appellate courts

## EDUCATION

Yale Law School, J.D., 1998

- Notes Editor on the *Yale Law Journal*

Duke University, B.A., 1993

of a grocery store chain. After we filed a motion to dismiss, the plaintiff dismissed the case. *Balint v. The Fresh Market, Inc.*, 16 CvS 4144 (Guilford County/N.C. Business Court).

- Defended a technology company and its officers in a shareholder lawsuit alleging securities fraud. We filed a motion to dismiss, and the lawsuit was dismissed by the Court. *In re ChannelAdvisor Corp. Securities Litigation*, 2016 WL 1381772 (E.D.N.C. 2016).
- Defended a special committee and the independent directors of a bank in shareholder litigation arising from a proposed merger. The litigation sought among other things to invalidate a bylaw requiring that certain shareholder actions be brought exclusively in North Carolina. In a precedent setting opinion, the Delaware Court of Chancery enforced the bylaw and dismissed the case. *City of Providence v. First Citizens Bancshares, Inc.*, 99 A.3d 229 (Del. Ch. 2014).
- Defended a clinical diagnostic company and its board of directors in shareholder litigation challenging the proposed acquisition of the company. A settlement was reached and the acquisition proceeded. *Overby v. LipoScience, Inc.*, 14 CvS 13448 (Wake County/N.C. Business Court).
- Represented corrugated packaging companies in a post-closing dispute in which our client was attempting to collect on a deferred payment provision in the asset sale agreement. Summary judgment was granted in favor of our client for the full amount of the payment. *Gallagher v. Southern Source Packaging, LLC*, 568 F. Supp. 2d 624 (E.D.N.C. 2008).
- Represented a group of shareholders to obtain judicial dissolution of a corporation in which management had been wasting corporate assets in a case receiving local media attention. The dissolution

## CLERKSHIPS

Law Clerk for the Hon. Gerald B. Tjoflat of the United States Court of Appeals for the Eleventh Circuit

was granted by the Court. *Marosi v. M.F. Harris Research, Inc.*, 13 CvS 1230 (Carteret County).

#### Contract Disputes

- Represented a publisher of telephone directories in a breach of contract case against a national telecommunications company. After a bench trial, the Court ruled in our client's favor on all issues and issued a declaratory judgment that saved our client over \$100 million, and awarded our client over \$1.2 million in attorneys' fees. *H. Donnelley Inc. v. Embarq Corp.*, 2013 WL 4005261 (N.C. Ct. App. 2013).
- Represented a blood plasma collection business in a breach of contract case against a pharmaceutical company. After a trial, the jury awarded our client \$37 million plus interest. The judgment was affirmed on appeal and collected in full. *Plasma Centers of America, LLC v. Talecris Plasma Resources, Inc.*, 731 S.E.2d 837 (N.C. Ct. App. 2012).
- Defended a hair products manufacturer against a breach of contract claim by a distributor. After extensive litigation, the distributor dismissed its claim. *W.T. Distributing, Inc. v. Johnson Products Co.*, 3:13-cv-171 (W.D.N.C.).
- Represented tobacco manufacturers in North Carolina enforcement of the arbitration provision in a Master Settlement Agreement. Our clients were successful in getting the case sent to arbitration. *State of North Carolina v. Philip Morris USA, Inc.*, 666 S.E.2d 783 (N.C. Ct. App. 2008).
- Defended a bank in confidential arbitration arising out of a contract dispute with a customer regarding ownership of certain funds at the bank. After a full evidentiary hearing, the arbitrator issued an award favorable to the bank.
- Represented a nursing home owner to secure enforcement of an arbitration provision in its

admission agreement with a resident. After numerous court filings, the resident ultimately agreed to abide by the arbitration provision. *Durham III LLC v. Sexton*, 5:11-cv-708 (E.D.N.C.).

#### Business-Related Torts and Statutory Claims

- Defended a venture capital firm and two of its principals in a lawsuit against allegations that they had engaged in unfair and deceptive trade practices. The case was dismissed by the trial court and the dismissal was unanimously affirmed on appeal. *Moch v. A.M. Pappas & Associates, LLC*, 794 S.E.2d 898 (N.C. Ct. App. 2016).
- Defended a bank in numerous consumer class action lawsuits around the country alleging that the bank facilitated improper lending practices. *Elder v. BMO Harris Bank*, 8:13-cv-3043 (D. Md.) and others.
- Defended a provider of interlock ignition devices against a class action lawsuit alleging violations of the Consumer Leasing Act. The lawsuit was dismissed by the trial court and the dismissal was unanimously affirmed on appeal. *Cottle v. Monitech, Inc.*, 2017 WL 6519024 (E.D.N.C. 2017), *affirmed* 733 Fed. Appx. 136 (4<sup>th</sup> Cir. 2018).
- Represented a bank seeking to have a defamatory video regarding one of the bank's employees taken down. The court ordered the video removed, and the order was unanimously affirmed on appeal. *Springs v. Ally Financial Inc.*, 2017 684 Fed. Appx. 336 (4<sup>th</sup> Cir. 2017).
- Defended a bank in a consumer lawsuit asserting emotional distress, unfair and deceptive trade practices, and numerous other claims as a result of a death allegedly caused by an improper automobile repossession. All non-contract claims were dismissed by the court. *Costin v. Ally Bank Corp.*, 2014 WL 130527 (E.D.N.C. 2014).

- Defended the estates of pilots working for a NASCAR racing company against claims of willful and wanton negligence in connection with a fatal plane crash. After a lengthy trial, the jury found in favor of our clients. *Dorton v. Hendrick Motorsports, Inc.*, 792 F. Supp. 2d 870 (M.D.N.C. 2011).
- Defended a contractor who had been engaged by the United States government to rebuild municipal water and sewage facilities in Iraq against personal injury claims by an engineer. The trial court granted summary judgment in favor of our client, and unanimously affirmed on appeal. *Ladd v. Research Triangle Institute*, 335 Fed. Appx. 285 (4<sup>th</sup> Cir. 2009).

#### Internal Investigations

- Assisted a major university in investigating a security breach involving the improper disclosure of confidential and proprietary football game plan information to opposing teams.
- Assisted a bank in investigating suspicious deposit activity.
- Assisted a pharmaceutical company in investigating inconsistencies in clinical test results.

#### **HONORS & AWARDS**

- *The Best Lawyers in America*®, Commercial Litigation, Litigation-Mergers and Acquisitions Law, Litigation-Securities (2018-2020)
- "Lawyer of the Year," *The Best Lawyers in America*®, Raleigh Litigation-Securities Law (2020)
- *Benchmark Litigation*, North Carolina State Litigation Star (2015-2019)
- *Benchmark Litigation*, North Carolina State Future Star (2009-2014)
- North Carolina *Super Lawyers* (2014-2019)

- North Carolina *Super Lawyers*, Rising Star (2010, 2012)

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- Co-Chair, Securities Litigation Subcommittee of the Commercial & Business Litigation Committee, American Bar Association
- North Carolina Business Court Rules Committee
- North Carolina Bar Association, Litigation Section
- Wake County Bar Association

## Kara Brunk

Attorney

Wells Fargo Capitol Center  
150 Fayetteville Street, Suite 2300  
Raleigh, North Carolina 27601  
Phone: 919.821.6711  
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kbrunk@smithlaw.com



Kara's practice is focused in the areas of Employee Benefits and Executive Compensation. She represents public, private, governmental and non-profit employers in designing and documenting retirement plans, welfare benefit plans, fringe benefit plans and executive compensation plans.

Prior to joining Smith Anderson, Kara was an associate in the Raleigh office of a regional law firm. Previously, Kara was an intern for Justice Timmons-Goodson at the North Carolina Supreme Court. During law school, she was a merit scholarship recipient and a recipient of the 2010 Gressman-Pollitt Award for Oral Advocacy.

### EXPERIENCE

- Amending and restating qualified retirement plans to comply with the Pension Protection Act and other changes in the law.
- Advising employers regarding designing and administering benefits plans in compliance with the Internal Revenue Code and ERISA.
- Drafting and revising health and welfare plan documents and summary plan descriptions.

### AA CONTACT INFO

Tracy Benning  
Phone: 919.821.6654  
tbenning@smithlaw.com

### PRACTICE AREAS

Employee Benefits and Executive Compensation

### BAR & COURT ADMISSIONS

North Carolina

### EDUCATION

University of North Carolina School of Law, *high honors*, J.D., 2012

- Order of the Coif

University of North Carolina at Chapel Hill, *with distinction*, B.A. in Political Science, 2009

- Phi Beta Kappa

- Assisting employers with identifying and correcting plan errors through DOL and IRS compliance programs.
- Reviewing and amending executive compensation arrangements.
- Advised a leading CRO in Asia on the employee benefits aspects of its acquisition of CRO assets in the United States.
- Advised a publicly-traded health information technologies and clinical research company on the employee benefits aspects of its sale of a consulting line of business.
- Advised a private equity fund on the employee benefits aspects of its acquisition of a specialty pharmaceutical company.
- Advised a leading contract research organization in a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services. Advised specifically on benefits reps, warranties and covenants, conducted due diligence and helped the company navigate integration issues.

## HONORS & AWARDS

- Staff Member and Contributing Editor, *North Carolina Law Review*, 2010-2012

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- Board Member, Food Runners Collaborative, 2017-Present, Secretary, 2019
- Board Member, Raleigh Kiwanis Foundation, 2016-2018
- President, Triangle Benefits Forum, 2016-2019

- Board Member, Domestic Violence Action Project, 2010-11
- Member, Civil Legal Assistance Clinic, 2011-12
- North Carolina Bar Association
  - Membership Committee, 2017-Present
  - YLD Community Relations Committee, 2016-2017
- Wake County Bar Association

## Taylor M. Dewberry

Attorney

Wells Fargo Capitol Center  
150 Fayetteville Street, Suite 2300  
Raleigh, North Carolina 27601  
Phone: 919.821.6729  
Fax: 919.821.6800  
tdewberry@smithlaw.com



Taylor Dewberry joined Smith Anderson in 2017. She is an associate in Smith Anderson's Employment, Labor and Human Resources practice group. Her practice focuses on employment-related counseling and defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims. She has represented clients in state and federal courts and agencies throughout North Carolina.

### EXPERIENCE

- Advised a leading contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- Defended employers against claims involving discrimination, wrongful discharge, retaliation, harassment, wage and hour, and civil rights claims.
- Represented clients in investigations conducted by the Equal Employment Opportunity Commission.
- Presented on workplace issues, such as recruiting, onboarding and sexual harassment law.
- Conducted an internal investigation into workplace harassment.

### AA CONTACT INFO

Tracy Benning  
Phone: 919.821.6654  
tbenning@smithlaw.com

### PRACTICE AREAS

Employment, Labor and Human Resources

### BAR & COURT ADMISSIONS

North Carolina

U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina

### EDUCATION

- Washington University School of Law, *cum laude*, J.D., 2017
- Stanford University, B.A., *with honors*, American Studies with a minor in African-American Studies, 2014

## HONORS & AWARDS

Executive Notes Editor, *Washington University Journal of Law and Policy*

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- Member, North Carolina Bar Association
  - Chair, Young Lawyers Division, Diversity and Inclusion Committee
- Member, Wake County Bar Association
- Executive Board Member, Black Law Students Association

## CLERKSHIPS

- Judicial Intern, Chief Justice Mark Martin, North Carolina Supreme Court
- Judicial Intern, Judge James A. Wynn Jr., United States Court of Appeals for the Fourth Circuit

**Sarah W. Fox**

Attorney

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150 Fayetteville Street, Suite 2300  
Raleigh, North Carolina 27601  
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sfox@smithlaw.com



Sarah Fox has more than 30 years' experience in employment and labor law, coupled with commercial litigation. Sarah clerked with the Honorable Robert D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina and is a member of the Fourth Circuit Judicial Conference. She is a recipient of the *Triangle Business Journal's* Women in Business Award, has been honored as one of the Top 50 Female *Super Lawyers* by North Carolina *Super Lawyers*, is listed in *The Best Lawyers in America®*, and elected to *Business North Carolina's* Legal Elite. Sarah is active in industry associations and community organizations including having served on multiple boards and as Chair of the Foundation of Hope, President of The Badger Iredell Foundation, Inc., President of Capital Area Preservation, President of The Junior League of Raleigh, and served on the Executive Committees of the NC Museum of History Associates and SAFEchild.

Her practice includes federal and state discrimination laws; workplace investigations; human capital management; wage and hour compliance; executive shareholder claims; workforce policies, procedures and handbooks; employment agreements; executive compensation; restructuring; wrongful discharge; severance and separation programs; merger and acquisition workplace transitions; confidentiality, assignment of inventions, and non-competition agreements; trade secrets and fiduciary duties; harassment; ADA; FMLA; workplace

**AA CONTACT INFO**

Jacqueline Williams  
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jwilliams@smithlaw.com

**PRACTICE AREAS**

Employment Litigation  
Employment, Labor and Human Resources  
Litigation  
Non-Compete and Trade Secrets  
OSHA and Workplace Safety

**BAR & COURT ADMISSIONS**

Supreme Court of the United States  
U.S. Court of Appeals for the Fourth Circuit  
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina  
All North Carolina State Courts

violence; OSHA; drug and alcohol compliance; compensation for tax-exempts; and alternative staffing.

Sarah has been a guest lecturer in employment law at North Carolina State University in the Masters in Accounting Program, conducted human resource training, led diversity initiatives and training and is a frequent speaker and author on employment matters. She has substantial experience in conducting workplace investigations and successfully litigating federal and state claims, including discrimination claims, non-competition and employee misappropriation claims and executive shareholder claims.

Prior to joining Smith Anderson, Sarah was a founding partner of the employment and labor practice in the Raleigh office of a global law firm.

## EXPERIENCE

- Represented Global 100, Fortune 500 and private employers in defense of federal and state employment claims
- Represented U.S. Congressman in contested election
- Represented shareholder executive in obtaining multimillion dollar bench and jury awards
- Conducted internal workplace investigations and human resource training
- Represented employers and executives in noncompetition, confidentiality and fiduciary disputes
- Represented employers in OSHA industrial fatality accidents
- Represented employers in defense of pattern and practice claims by the Equal Employment Opportunity Commission
- Represented employers and executives in connection with employment arrangements

## EDUCATION

Wake Forest University, J.D., *cum laude*, 1983

- Wilson Academic Scholar, Wake Forest University School of Law

Tulane University, B.A., 1977

## CLERKSHIPS

Law Clerk to the Honorable Robert. D. Potter, Chief Judge for the U.S. District Court for the Western District of North Carolina

## HONORS & AWARDS

- *The Best Lawyers in America*®, Employee Benefits (ERISA) Law (2013-2020)
- *Business North Carolina* Legal Elite
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers*, Top 50 Female Super Lawyers
- *Triangle Business Journal*, Women in Business Award

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment Law Section
- Fourth Circuit Judicial Conference, Member
- Human Resources Roundtable, Chair 2011-present
- North Carolina Bar Association, Employment Law Section
- Badger-Iredell Foundation
  - President 2001-2002
  - Board of Directors 1996-2002
- Capital Area Preservation
  - President 1995-1996
  - Board of Directors 1992-1995
- Cerebral Palsy Center of North Carolina, Inc., Past Board of Directors
- Duke University Health System, Duke Raleigh Hospital Advisory Board
- Foundation of Hope
  - Chair, 2006-present
  - Board of Trustees, 1995-present

- Greater Raleigh Chamber of Commerce, Chair Human Resources Roundtable 2004-2011
- Governor’s Summit on Volunteerism, Delegate
- Guatemala Mission, 2008
- Head Start Volunteer Award
- Junior League of Raleigh
  - President 1996
  - Board of Directors 1992-1995
  - Sustaining Advisor 2005-2006
  - Executive Committee 1993-1994
  - Community Vice President 1993-1994
  - Provisional Chair 1994-1995
- Leadership Raleigh Alumnus
- North Carolina Bar Foundation, Development Committee 2018-Present
- North Carolina Inaugural Ball, Co-Chair 2001
- North Carolina Museum of History, Hugh Morton Event Co-Chair 2004
- North Carolina Museum of History Associates
  - Board of Directors 2010-2018
  - Executive Committee 2011-2012
  - Chair, Human Resource Committee 2011-2012
  - Co-Chair Executive Director Search Committee 2012
- Prevent Blindness North Carolina
  - Board of Directors 2003-2007
  - “Eyes of March” Gala Co-Chair 2003
- Ravenscroft

- Trustee Advisory Council 2014-Present
  - Executive Committee 2008-2011
  - Board of Directors 2005-2011
  - Corporate Secretary 2008-2011
  - Audit Chair 2008-2011
- SAFEchild
  - Board of Directors 1995-2004
  - Executive Committee 1995-1996, 2002-2004
  - Chair, Personnel Committee 2002-2003
- Special Olympics World Games, Co-Chair Honored Guest Committee 1999
- The First Lady of North Carolina Luncheon
  - Co-Chair 2001, 2005
- Wake Forest University School of Law
  - Board of Visitors 2013-2019

**J. Travis Hockaday**

Attorney

Wells Fargo Capitol Center  
150 Fayetteville Street, Suite 2300  
Raleigh, North Carolina 27601  
Phone: 919.821.6757  
Fax: 919.821.6800  
thockaday@smithlaw.com



Travis Hockaday has practiced with Smith Anderson since September 2003. His practice focuses on providing employment-related counseling and risk management advice to clients in a variety of industries, both public and private, and identifying and managing employment-related issues in mergers, acquisitions and reorganizations. He also represents clients in state and federal courts and agencies throughout North Carolina and other jurisdictions.

His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims; defending wage and hour, ERISA and other benefit-related claims; and representing clients in investigations conducted by, and proceedings before, both federal and state departments of labor, the Equal Employment Opportunity Commission, the U.S. Department of Justice, the North Carolina Industrial Commission and the North Carolina Division of Employment Security.

Travis is a frequent speaker on employment and labor law issues and regularly conducts training for human resources professionals and executive management.

**AA CONTACT INFO**

Kristin Terry  
Phone: 919.838.2140  
kterry@smithlaw.com

**PRACTICE AREAS**

Complex Contract Disputes  
Employment Litigation  
Employment, Labor and Human Resources  
Litigation

**BAR & COURT ADMISSIONS**

U.S. Court of Appeals for the Fourth Circuit  
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina  
All North Carolina State Courts

## EXPERIENCE

- Defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims
- Defending wage and hour, ERISA, and other benefit-related claims
- Representing clients in investigations conducted by both federal and state Departments of Labor, the Equal Employment Opportunity Commission and the U.S. Department of Justice
- Advised a leading CRO in Asia on the employment law aspects of its acquisition of CRO assets in the United States
- Advised a publicly-traded health services company on the employment law aspects of its acquisition of a health services division of a privately-held company for \$105 million in cash
- Advised a leading healthcare services provider on the employment law aspects of its \$60 million cash acquisition of a global sourcing company
- Advised a private equity-backed medical device repair services company on the employment law aspects of its sale of its wholly-owned operating subsidiaries to a strategic buyer operating in the medical device repair services industry
- Advised a publicly-traded health information technologies and clinical research company on the employment law aspects of its acquisition of a consulting business focusing on orphan drug designations
- Advised a private equity fund on the employment law aspects of its acquisition of a specialty pharmaceutical company

## EDUCATION

University of North Carolina, J.D.,  
2003  
Campbell University, B.A., *summa  
cum laude*, 2000

- Advised a frozen foods company on the employment law aspects of its definitive agreement to acquire a frozen snacks business
- Representing clients before the North Carolina Employment Security Commission
- Advising clients regarding the development of effective employee handbooks, policies and practices
- Representing employers and individuals in connection with allegations of violation of non-compete agreements, unfair competition and tortious interference with contract
- Providing training to management, human resource professionals and employees regarding numerous employment-related topics, including workplace discrimination and harassment, religion in the workplace, unemployment compensation, the Family and Medical Leave Act and the Uniformed Services Employment and Reemployment Rights Act
- Advising clients on variety of state and federal regulatory issues
- Serving as outside counsel to a state licensing agency

## HONORS & AWARDS

- North Carolina *Super Lawyers*, Rising Star (2011, 2018)
- *The Best Lawyers in America*®, Litigation - Labor and Employment (2019, 2020)

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Labor & Employment and Litigation Sections
- North Carolina Association of Defense Attorneys

- North Carolina Bar Association, Young Lawyers Division, Labor & Employment, and Litigation Sections
- Member, North Carolina Bar Association Lawyer Effectiveness/Quality of Life Committee (2008-2012)
- Member, Society for Human Resources Management
- Wake County/Tenth Judicial District Bar Association
- Grove Presbyterian Church
  - Elder and Trustee (1999-2005; 2012-2017)
  - Clerk of Session (2013-2017)
- Class of 2003 Reunion Representative, University of North Carolina School of Law

## Rosemary G. Kenyon

Attorney

Wells Fargo Capitol Center  
150 Fayetteville Street, Suite 2300  
Raleigh, North Carolina 27601  
Phone: 919.821.6629  
Fax: 919.821.6800  
rkenyon@smithlaw.com



Rose Kenyon's practice involves all aspects of employment and labor law counseling and litigation, across a wide variety of industries and companies, both public and private. She has extensive experience advising companies on their most strategic and high risk employment issues. Rose also works with companies on employment matters in mergers and acquisitions and has extensive experience drafting complex employment agreements and separation agreements on behalf of both companies and executives. Rose is a frequent speaker on emerging employment and labor law trends and regularly conducts training for human resources professionals and executive management. Rose also serves as a mediator to resolve disputes outside of litigation.

Prior to joining Smith Anderson, Rose served for 13 years as in-house counsel for Carolina Power & Light Company (now known as Duke Energy), having served as Deputy General Counsel.

Rose serves as Chair of the firm's Pro Bono Committee.

Early in her career, Rose practiced with a civil practice firm in Richmond, Virginia.

### EXPERIENCE

- Served as lead in-house employment and labor counsel to a Fortune 500 company for 13 years,

### AA CONTACT INFO

Cheryl Baber  
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cbaber@smithlaw.com

### PRACTICE AREAS

Complex Contract Disputes  
Employment Litigation  
Employment, Labor and Human Resources  
Litigation

### BAR & COURT ADMISSIONS

U.S. Court of Appeals for the Fourth Circuit  
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina  
U.S. District Courts for the Eastern and Western Districts of Virginia  
North Carolina, 1986  
Virginia, 1980

during a period of rapid change that included major workforce restructurings, union organizational activity, numerous employment based lawsuits and claims (including several multiple plaintiff suits and systemic claims), multiple OFCCP audits (including corporate headquarters and glass ceiling), among other things.

- Lead employment lawyer in numerous merger and acquisition transactions in a wide range of industries that included the resolution of significant transition issues regarding the misclassifications of workers (e.g., wage and hour, independent contractor), leased employee arrangements, liability for significant paid-time-off balances, professional employer organization arrangements, non-competition agreements, executive employment agreements, and cross-border issues, among other things.
- Conducted internal investigations into misconduct, embezzlement, harassment, threats of workplace violence and other wrongdoing, for both publicly-traded and private companies.
- Represented employers in the development of employment agreements, severance and non-competition agreements for senior level officers of both private and publicly-traded companies and private institutions of higher education.
- Represented CEOs and senior level officers of both private and publicly-traded companies, and private institutions of higher education, in connection with their employment agreements in a wide range of industries, including the institutional health care, pharmaceutical, banking, technology and manufacturing industries, and in higher education.
- Represented national and global companies in major reorganizations and downsizings of their workforces, including the relocation of offices, in a wide-variety of

Michigan, 1979

#### **EDUCATION**

University of Notre Dame, J.D.,  
1979

Saint Mary's College (Notre Dame,  
IN), B.A., *magna cum laude*, 1976

#### **CLERKSHIPS**

Volunteer clerk for the Honorable  
W. Earl Britt, District Court Judge  
for the Eastern District of North  
Carolina

industries including the pharmaceutical, hospitality, technology, utility and manufacturing industries.

- Provided strategic and risk management advice on sensitive and high-risk employment decisions and processes, corporate governance and the development of system-wide policies and handbooks.
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than \$17.6 billion at closing.
- Represented a global solid state LED lighting and semiconductor manufacturing company in connection with the employment aspects of its announced agreement for its \$850 million sale of assets to a publicly traded German semiconductor company. The transaction was terminated before completion due to regulatory considerations.
- Advised a specialty pharmaceutical company on employment-related matters in a \$120 million merger with a subsidiary of a publicly-traded international pharmaceutical company.
- Advised a semiconductor and LED company on the employment law aspects of the divestiture of its lighting products business unit for an initial cash payment of \$225 million plus the potential to receive an earn-out payment based on the business's post-closing performance.
- Advised a company specializing in technological pharmaceutical solutions on employment-related matters in a definitive agreement to acquire a company specializing in customized pharmaceutical reimbursement-based programs.

- Successfully defended numerous whistleblower claims under federal and state laws.
- Successfully defended employers against systemic claims of race discrimination, and sensitive harassment and gender discrimination claims before the EEOC and the OFCCP.
- Successfully defended employers before OSHA in serious injury and fatality cases.
- Successfully defended employers in discrimination and employment contract lawsuits in federal and state court, including appeals.
- Advised employers on system-wide wage and hour and independent contractor classification issues under federal and state wage and hour laws and tax laws.
- Represented employers in government audits of I-9 compliance.

## HONORS & AWARDS

- Fellow, College of Labor and Employment Lawyers
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2008-2019)
- *The Best Lawyers in America*®, Employment Law - Management (2016-2020)
- Women of Justice Award, *North Carolina Lawyers Weekly* (2012, 2019)
- North Carolina *Super Lawyers* (2012-2019)
- North Carolina *Super Lawyers*, Top 50 Women (2014)
- Academy of Women of the YWCA of the Greater Triangle, Inducted 2004
- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Foundation

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Bar Association
  - Board of Governors (2005-2008)
  - Chair, Strategic Planning and Emerging Trends Committee (2008-2011)
  - Chair, Women in the Profession Committee (2001-2004)
  - Chair, Dispute Resolution Section (1995-1996)
  - Council Member, Corporate Counsel Section (1989-1997)
  - Sections of Labor and Employment, Litigation and Dispute Resolution
- American Bar Association
  - Sections of Labor and Employment, Litigation and Dispute Resolution
- Wake County Bar Association and Tenth Judicial District Bar
  - Grievance Committee (2013-2016)
  - Strategic Planning Committee (2015-2016)
- Saint Mary's College Alumnae Association, Board of Directors (Notre Dame, IN) (2015-present)
  - Committee Chair and Member of Executive Committee (2016-present)
- Community Music School of Wake County, Board of Directors (2014-present)
  - President (2019-Present)
  - Secretary (2017-2019)
  - Member of Executive Committee (2016-present)

- Chair of Search Committee for Executive Director (2018)
- Habitat for Humanity of Wake County
  - Board Chair (2011-2013)
  - Board of Directors (2005-2013)
  - Honorary Co-Chair, Women's Build (2014)
  - Honorary Chair, 17th Annual Holiday Home Tour & Party (2017)
- Pines of Carolina Girl Scout Council
  - President (1992-1995)
  - Board of Directors (1986-1995)

**Kimberly J. Korando**

Attorney

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Kim Korando is recognized as one of North Carolina's leading employment lawyers by *Chambers USA: America's Leading Business Lawyers*, *Law and Politics North Carolina Super Lawyers*, *The Best Lawyers in America*® and *Business North Carolina* Legal Elite. She leads Smith Anderson's Employment, Labor and Human Resources practice group.

Kim's advice and representation are sought in matters of financial, reputational and operational significance to leading employers. Her work has led to *Chambers'* client reviews describing her as "simply outstanding on employment law," "a diligent top tier attorney," who does "a first class job" and "has a way of looking at several different sides of a situation to evaluate it clearly," and "is exceedingly bright, capable and practical, and gives current pragmatic advice."

Kim serves as general outside employment, labor and human resources counsel to public and private companies in a wide variety of industries including utilities, pharmaceuticals, biotechnology, hospitals and healthcare, automotive, semiconductor, paper/cellulose and furniture manufacturers, insurance, banking, retail, hospitality, and food and beverage distribution, as well as municipalities and law firms.

Kim is retained as special counsel to conduct independent internal investigations into allegations of harassment,

**AA CONTACT INFO**

Kristin Terry  
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kterry@smithlaw.com

**PRACTICE AREAS**

Data Use, Privacy and Security  
Employment Litigation  
Employment, Labor and Human Resources  
Litigation

**BAR & COURT ADMISSIONS**

Supreme Court of the United States  
U.S. Court of Appeals for the Fourth Circuit  
U.S. District Courts for the Eastern, Middle and Western Districts of North Carolina  
All North Carolina State Courts

discrimination, code of conduct violations, whistleblowing and embezzlement and root cause of management failures.

Kim is a frequent speaker, trainer and writer on employment and human resources issues in the business and legal community. She regularly collaborates with companies developing in-house training programs and has trained thousands of supervisors, managers and Human Resources professionals in legally compliant employment practices, as well as investigators for the U.S. Equal Employment Opportunity Commission. She served as Chapter Editor for the nation's leading employment discrimination treatise, authors a leading North Carolina workplace guidebook through the North Carolina Chamber, [North Carolina Human Resources Manual](#), and is a frequent speaker for nationally recognized organizations.

## EXPERIENCE

- Regularly advises global companies based outside the U.S. (Japan, Germany, The Netherlands, Austria, France, U.K. and Canada) and outside North Carolina with regard to establishing North Carolina workforces and associated compliance with U.S. and North Carolina laws.

### FLSA

- Enterprise-wide audits of worker classification and time recording practices and development of strategies for reclassifying misclassified workers and practical solutions for time recording practices (including donning/doffing, automatic clocking/deductions and use of remote devices for work) for manufacturing, healthcare, hospitality, distribution, technology and other industry employers.

### EEO

- Successful defense of EEOC investigations and OFCCP compliance audits focusing on allegations of

## EDUCATION

University of Oklahoma, J.D., with honors, 1986

University of Oklahoma, B.S., in psychology, 1980

class-wide race, gender and disability discrimination in hiring, promotion, compensation and terminations, including challenges to criminal history, testing and other employee selection criteria.

- Successful pre-litigation resolution of allegations of systemic race and gender discrimination, including those made by current employees and supported by national and local civil rights groups, and allegations of harassment against executives and high ranking officials.

#### **Affirmative Action**

- Establishment and annual update of affirmative action plans for defense and other federal contractors (financial, healthcare, pharmaceutical, manufacturing, consulting, distribution, hospitality) with special emphasis on risk management regarding analysis of employment activity, compensation, recruiting and selection procedures.

#### **Whistleblowing/Retaliation**

- Successful defense of whistleblower and retaliation complaints before the U.S. Department of Labor, EEOC and other agencies, including environmental and financial fraud complaints.

#### **Internal Investigations**

- Retained as special counsel to conduct internal investigations into allegations of harassment, discrimination, code of conduct violations, embezzlement and root cause of management failures.

#### **Restructuring**

- Design of comprehensive workforce restructuring programs, including voluntary separation programs and employee selection and staffing processes that

have been successfully defended before the U.S. Court of Appeals.

#### **ADA/FMLA/Absence Management**

- Led interdisciplinary publicly-traded Fortune 500 corporate ADA task force charged with: identifying Title I and Title III compliance issues; reviewing and modifying corporate policies, procedures and practices including medical testing, qualification standards and test administration accommodation.
- Developed and integrated corporate policies for hospitals, banks and pharmaceutical, manufacturing and technology companies regarding FMLA/STD/ADA reasonable accommodation leave/workers' compensation leave and absence management. Developed fitness for duty programs including functional capacity testing for manufacturing, healthcare and distribution worksites.

#### **Crisis Management**

- Coordinated and managed regulatory, communication and risk management response to high profile industrial accidents and fatalities and other workplace crises.

#### **Labor**

- Coordinated responses to union organization campaigns and collective bargaining with USW and IBEW.

#### **Training**

- Developed highly participatory mock trial training experience in which supervisors experience first-hand how their decisions play out in front of a jury which has been customized for employers in a wide range of industries and delivered across the country.

## Technology and Related Policies

- Assisted companies with development of BYOD, remote work, social media and departing employees procedures designed to protect company reputation and assets.

## HONORS & AWARDS

- *The Best Lawyers in America*®, Employment Law - Management, Labor Law - Management (2007-2020)
- *The Best Lawyers in America*® “Lawyer of the Year,” Raleigh Labor Law - Management (2013)
- *Business North Carolina* Legal Elite (2007, 2009-2010, 2012-2013)
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2005-2019)
- Martindale-Hubbell AV Preeminent Rated since 1999
- North Carolina *Super Lawyers* (2006-2019)
- North Carolina *Super Lawyers*, Top 50 Women (2013-2015)
- *Oklahoma Law Review*, Note Editor

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- ABA Equal Employment Opportunity Committee
- American Bar Association, Labor and Employment Section
- American Employment Law Council
- Fellow, American Bar Foundation
- North Carolina Bar Association, Labor and Employment Section

## Stephen T. Parascandola

Attorney

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Steve Parascandola is recognized as one of North Carolina's leading environmental, health and safety lawyers by *Chambers USA: America's Leading Business Lawyers*, *The Best Lawyers in America*®, Marquis' *Who's Who in American Law*, *Business North Carolina's* Legal Elite, and North Carolina *Super Lawyers*. He leads Smith Anderson's Governmental Affairs, Administrative and Regulatory Law team, including the Environmental and OSHA practice groups.

Steve began his career as an environmental, health and safety attorney in the New York City office of a general practice law firm. Prior to joining Smith Anderson in 1996, he also spent over three years as Senior Enforcement Counsel for the North Carolina Department of Environmental Quality. Among other things, Steve served as co-counsel in the first Superfund cost recovery action ever brought by the State of North Carolina. He has also served as lead defense counsel in one of the largest OSHA enforcement actions brought to date in North Carolina.

His current practice involves many substantive areas of environmental, OSHA and land use law, including the State and Federal CERCLA, RCRA, UST, FIFRA, TSCA, FDA, FSMA, USDA/APHIS, Dry Cleaner Solvent and Brownfields Programs. His practice also includes water quality, landfill, storm water, and wetlands issues. In addition, Steve advises clients in the biotechnology, pesticide, agricultural,

### AA CONTACT INFO

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slangham@smithlaw.com

### PRACTICE AREAS

AgTech  
Commercial Real Estate  
Construction  
Corporate Relocation, Expansion  
and Incentives  
Environmental  
Life Sciences  
OSHA and Workplace Safety  
Real Estate Development

### BAR & COURT ADMISSIONS

North Carolina  
New York  
Florida

pharmaceutical and food management industries with respect to registrations, certifications, labeling, permits, and regulatory compliance.

He regularly counsels clients on risk management, particularly with respect to mergers and acquisitions, due diligence, insurance matters, investigations and audits, and public company environmental disclosures. He also has extensive experience representing clients before regulatory agencies and has handled a broad range of complex transactions for the purchase, sale, leasing, construction and development of commercial, industrial, and public utility properties.

Within the firm, Steve has held various leadership positions and currently serves as a member of the firm's Partnership Admission and Compensation Committees.

## EXPERIENCE

- Advised an investment company in a definitive agreement to purchase the outstanding equity interests of the largest independent blender and packager of lubricants to the automotive, agriculture, commercial and heavy duty markets in North America
- Served as local environmental counsel for Fortune 100 company that owns and operates large scale waste-to-energy facilities
- Represented a major convenience store chain for over 20 years in connection with acquisitions, enforcement defense, environmental permitting, and private party settlements throughout 14 states
- Represented a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals in connection with defense of one of the single largest OSHA enforcement actions ever brought by the N.C. Department of Labor

## EDUCATION

Stetson University, J.D., 1988

- *Law Review*

Eckerd College, B.A. 1984

Universidad Complutense de Madrid, 1982-1983

- Represented an international privately-held soft drink manufacturer, seller and distributing company in connection with its acquisitions and environmental and OSHA compliance at facilities across the United States
- Advised a semiconductor and LED company on the environmental aspects of the divestiture of its lighting products business unit for an initial cash payment of \$225 million plus the potential to receive an earn-out payment based on the business's post-closing performance
- Assisted the largest electric utility in the United States for over 16 years with acquisitions, dispositions, and regulatory compliance regarding the utility's power plant properties, lakes, substations, transmission and distribution projects across North and South Carolina
- Represented a national paper product company in connection with its environmental permitting and OSHA compliance at several North Carolina facilities
- Represented a major convenience store chain with environmental insurance coverage disputes throughout the Southeast
- Represented the largest electric utility in the United States who is a performing party in a CERCLA removal action at the largest Superfund Site in North Carolina and also in related contribution litigation brought against over 150 parties
- Represented the nation's third-largest poultry producer in OSHA enforcement defense, managing OSHA inspections, and with responses to employee complaints made to NCDOL's OSH Division
- Represented one of the nation's largest convenience store chains with the acquisition of 47 stores and 6 ethanol distribution facilities in Kansas and Missouri

- Assisted a global developer and manufacturer of pharmaceuticals, biopharmaceuticals and agrochemicals with OSHA compliance, document requests and inspections by NCDOL's OSH Division
- Represented various clients to defend against and avoid to third-party claims for property damage and personal injury related to off-site contamination from underground storage tanks and general facility operations

## HONORS & AWARDS

- *The Best Lawyers in America*©, Environmental Law (2007-2020)
- *Chambers USA: America's Leading Business Lawyers*, Environmental (2013-2019)
- *Business North Carolina "Legal Elite,"* Environmental
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2010-2013, 2016-2019)
- Marquis *Who's Who in American Law*
- Fluent in Italian and Spanish; conversational and written Portuguese

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- The Florida Bar
- New York Bar Association
- North Carolina Bar Association
  - Member, Environmental Law Section Council
- Wake County Bar Association
- Local Advisory Board, Capital Bank

- Member, Existing Industry Committee, Cary Chamber of Commerce
- President, Board of Governors of MacGregor Downs Country Club, Ltd.
- Member, North Carolina Association of Environmental Professionals
- Member, North Carolina Citizens for Business and Industry's Environmental Concerns Committee
- Member, North Carolina Economic Developers Association

## Susan Milner Parrott

Attorney

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sparrott@smithlaw.com



Susan Parrott has extensive experience in identifying and managing employment-related issues in mergers, acquisitions and reorganizations. She is frequently called upon to develop and interpret employment, non-competition, confidentiality, and severance agreements. In addition, she routinely advises clients on wage and hour matters, and assists in conducting internal compliance audits and responding to Department of Labor investigations.

### EXPERIENCE

- Served as lead employment lawyer in the representation of a publicly-traded specialty pharmaceutical company in its acquisition of a privately-traded specialty pharmaceutical company
- Served as lead employment lawyer for numerous acquisitions by a multi-state, publicly-traded convenience store operator
- Prepared executive employment agreement for the president and chief executive officer of a publicly-traded bank holding company
- Responsible for executive employment agreements required for the succession of the chief executive officer of a publicly-traded, global manufacturer of consumable products

### AA CONTACT INFO

Claire Dodd  
Phone: 919.821.6693  
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### PRACTICE AREAS

Employee Benefits and Executive Compensation  
Employment, Labor and Human Resources  
Litigation

### BAR & COURT ADMISSIONS

Supreme Court of the United States  
U.S. Court of Appeals for the Fourth Circuit  
U.S. District Court for the Eastern District of North Carolina  
All North Carolina State Courts

- Successfully defended U.S. Department of Labor investigations of wage and hour exemption classification in various industries including banking, software, retail distributing, restaurant, civil engineering and pharmaceutical manufacturing
- Successfully defended North Carolina Department of Labor investigation of wage payment practices for retail distributing company
- Conducted internal audits of wage and hour and wage payment matters for clients in various industries, including banking, pharmaceutical manufacturing and sales, retail and internet/technology
- Advised a multinational Fortune 500 provider of product development and integrated healthcare services on employment-related matters in its merger with a NYSE-listed global information and technology services company, creating a leading information and tech-enabled healthcare service provider. The equity market capitalization of the joined companies was more than \$17.6 billion at closing.
- Advised a private equity fund on employment-related matters in connection with its acquisition, equity and debt financing of a reference laboratory
- Advised a leading contract research organization on the employment law aspects of a definitive agreement to acquire a provider of contract research, clinical and regulatory and other consulting services.
- Advised a leading healthcare services provider on employment-related matters in connection with its \$60 million cash acquisition of a global sourcing company
- Advised a leading provider of pharmacy-based patient care solutions and medication synchronization services to independent and chain pharmacies on employment-related matters in its

## **EDUCATION**

University of North Carolina and Vermont Law School, J.D., with honors, 1981

University of North Carolina, M.P.H., 1978

Duke University, B.A., with honors 1974

approximately \$41 million sale of the company to a publicly-traded buyer

- Advised a French multinational industrial and steel distributor on employment-related matters in connection with its acquisition of a controlling interest in a Virginia-based steel service center
- Advised a frozen foods company on employment-related matters in connection with a definitive agreement to acquire a frozen snacks business.
- Appellate advocacy practice has included representation of clients before the North Carolina appellate courts, the Fourth Circuit Court of Appeals and the Supreme Court of the United States

## HONORS & AWARDS

- Martindale-Hubbell AV Preeminent Rated
- Fellow, American Bar Association

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association
- North Carolina Bar Association, Labor & Employment Section
- North Carolina Bar Association
  - Personnel Committee, Past Member
- North Carolina State Bar
  - Board of Continuing Legal Education, Past Member
- Wake County Bar Association
  - Professionalism Committee, Past Member
- Community Foundation
  - Wake County Advisory Board, Past Member
- White Memorial Presbyterian Church
  - Elder

**Kerry A. Shad**

Attorney

Wells Fargo Capitol Center  
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Raleigh, North Carolina 27601  
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kshad@smithlaw.com



Kerry's practice focuses on representing employers in all types of employment related litigation. She regularly defends employers against EEOC charges and lawsuits in federal and state courts involving alleged discrimination, harassment and retaliation. Kerry advises companies of all sizes, including global companies, on a wide variety of employment law issues across a range of industries, including pharmaceutical and CRO, technology, retail, hospitality and manufacturing.

Much of Kerry's practice in the last several years has focused on United States Department of Labor wage and hour investigations and related disputes. Kerry was part of the defense team that successfully represented GlaxoSmithKline in a case that went all the way to the Supreme Court where the issue was whether pharmaceutical sales representatives are exempt as outside sales people under the FLSA.

Kerry has been recognized as a leading employment lawyer by *Chambers USA*, *Best Lawyers*, *Legal Elite* and *Super Lawyers*. She is a graduate of Florida State University and received her law degree from UNC Chapel Hill.

Kerry holds key leadership roles in the firm, including Chair of the Compensation Committee and Co-Chair of the Diversity Committee.

**AA CONTACT INFO**

Tracy Benning  
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tbenning@smithlaw.com

**PRACTICE AREAS**

Complex Contract Disputes  
Employment Litigation  
Employment, Labor and Human Resources  
Litigation

**BAR & COURT ADMISSIONS**

Supreme Court of the United States  
United States Court of Appeals for the Fourth Circuit  
United States District Courts for the Eastern, Middle and Western Districts of North Carolina  
All North Carolina State Courts

## EXPERIENCE

- Successfully represented leading employers before the United States Equal Employment Opportunity Commission and state and local fair employment practices commissions across the country in connection with investigations of single claimant and class allegations
- Conducted in depth analysis for acquiring companies to determine whether target companies had properly classified employees as exempt under the FLSA, determined financial risk of misclassifications to support indemnity provision, and recommended changes to classifications to avoid future liability
- Represented global pharmaceutical company in series of class and collective actions filed in Arizona, California, Florida and New York alleging that the company's failure to pay its pharmaceutical sales representatives overtime for hours worked in excess of 40 per week violated the FLSA and state law. The Supreme Court ultimately affirmed the entry of summary judgment for the company
- Retained as special counsel by employers in a variety of industries to conduct internal corporate investigations into allegations of:
  - harassment, discrimination and employee misconduct, including allegations of pattern and practice sexual harassment and racial discrimination
  - retaliation against "whistleblowers"
  - misconduct by high-ranking company officials
- Successfully defended wage and hour audits and complaint investigations conducted by the federal and state departments of labor involving donning/doffing in manufacturing plants, overtime,

## EDUCATION

University of North Carolina, J.D.,  
with honors, 1991

- Editorial Board, *North Carolina Law Review*
- Order of the Coif

Florida State University, B.S., 1985

and misclassification issues (in a variety of industries) with exposure well in excess of \$1 million

- Represented publicly-traded company in action brought under the anti-retaliation provisions of the Sarbanes-Oxley Act (“SOX”) by former Internal Auditor who asserted his termination was in retaliation for having reported accounting and reporting irregularities to the company
- Represented convenience store chain in action filed in federal court in North Carolina by a member of the Sikh religion alleging religious and national origin discrimination in application of dress and grooming standards to screen out applicants
- Represented global pharmaceutical company in action filed in federal court in Tennessee and the Sixth Circuit Court of Appeals by former manufacturing plant employee alleging race and gender discrimination and harassment and retaliation
- Represented global pharmaceutical company in federal court action alleging race discrimination by employee in research and development
- Represented employers to secure (and to defend against) TROs and preliminary/permanent injunctions to enforce confidentiality, non-solicitation and non-competition agreements against former employees, and protect employers’ trade secrets in many industries, including technology, logistics/transportation, health care (physicians/physical therapists), insurance (agents/brokers), construction, and contract research organizations
- Represented medical group in action filed by former physician-employee alleging that miscalculations of compensation due under an employment contract violated the NCWHA
- Retained by employers after EEOC issued cause findings for representation during the conciliation

process and risk management of potential liability exposure

- Served as "in-house" employment litigation counsel to large company managing employment litigation in jurisdictions across the country
- Represented clients in arbitrations arising out of business sales and alleged violations of non-competition agreements
- Developed highly participatory and mock trial training exercise for HR professionals and investigators for large global pharmaceutical company in which they experienced first-hand how their decisions and actions play out in front of a jury. The program was customized to client's policy and workforce

## HONORS & AWARDS

- *The Best Lawyers in America*®, Employment Law - Management, Litigation - Labor & Employment (2009-2020)
- *Business North Carolina's Legal Elite*, Employment
- *Chambers USA: America's Leading Business Lawyers*, Labor & Employment (2012-2019)
- Martindale-Hubbell AV Preeminent Rated
- North Carolina *Super Lawyers* (2012-2019)
- *Triangle Business Journal's* "Women in Business Award" (2015)
- *Benchmark Litigation*, Labor & Employment Star - South (2019)

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- American Bar Association, Employment and Litigation

- North Carolina Bar Association, Employment and Litigation Sections
- North Carolina Association of Defense Attorneys, Employment and Commercial Litigation
- Director and Secretary, The Chordoma Foundation (2015 - Present)
- Wake County Bar Association

## Christopher G. Smith

Attorney

Wells Fargo Capitol Center  
150 Fayetteville Street, Suite 2300  
Raleigh, North Carolina 27601  
Phone: 919.821.6745  
Fax: 919.821.6800  
csmith@smithlaw.com



Chris Smith is co-chair of the firm's Business Litigation team, and is a trial and appellate lawyer who counsels clients on business strategy matters. He manages large multi-party and multi-jurisdiction litigation projects and mission-critical projects for clients. In *Chambers USA*, clients describe him as "*fabulous*" (*Chambers USA 2019*), "*extremely proactive and insightful*" and say he "*provides excellent strategic advice*" (*Chambers USA 2018*), and as "*bright, extremely cerebral yet superbly practical in his approach when managing a dispute*" (*Chambers USA 2014*). He both prosecutes and defends claims, and advises clients on business risk management in a variety of areas.

He is Chair of the Board of Directors of the North Carolina Chamber Legal Institute and also serves on the Board of Directors of the North Carolina Chamber. He is a Past-President of the North Carolina Association of Defense Attorneys. He works with business groups and government officials on initiatives to improve the quality and efficiency of the administration of justice in North Carolina and on policy and legislative matters affecting the business legal climate in the state.

Chris has tried numerous lawsuits to jury verdict. His recent projects include a multi-jurisdiction project for a telecommunications infrastructure client, obtaining a seminal ruling on the validity of a "poison pill" plan, as well as a

### AA CONTACT INFO

Tracy Benning  
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tbenning@smithlaw.com

### PRACTICE AREAS

Appellate Advocacy  
Complex Contract Disputes  
Corporate and Securities Litigation  
Corporate Relocation, Expansion  
and Incentives  
Insurance Recovery Litigation and  
Counseling  
Insurance Regulation  
Intellectual Property Litigation  
Litigation  
Non-Compete and Trade Secrets

### BAR & COURT ADMISSIONS

U.S. Court of Appeals for the  
District of Columbia Circuit

commercial dispute involving multiple contracts and diverse venues.

He has argued appeals before the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Fourth Circuit and the North Carolina Court of Appeals.

Chris was an associate with an international law firm in Washington, D.C. before joining Smith Anderson in 1995.

## EXPERIENCE

- Lead counsel and management of multi-venue contract dispute involving lawsuit, arbitration and public utility commission proceedings arising out of contracts addressing client's business in 27 states
- Lead counsel for nationwide risk management project for telecommunications infrastructure company involving multiple parties and lawsuits in state and federal court and regulatory proceedings in various state public utilities commissions
- Co-lead counsel for client who successfully sued to have a "poison pill" adopted by a bank declared unlawful
- Lead counsel for client who successfully defended against a preliminary injunction in a trademark infringement case for a new subsidiary business
- Lead counsel in large trade secrets and unfair and deceptive trade practices claim for plaintiff corporation resulting in verdict at trial for plaintiff client
- Lead counsel for defendant client in \$50 million+ arbitration regarding earn-out provisions of an asset purchase and sale agreement resulting in favorable verdict for defendant client

U.S. Court of Appeals for the Fourth Circuit

U.S. District Courts, Eastern, Middle and Western Districts of North Carolina

All North Carolina State Courts

Connecticut

District of Columbia

New York

## EDUCATION

University of Pennsylvania, J.D.,  
*cum laude*, 1992

University of Pennsylvania, B.A.,  
*summa cum laude*, 1987

- Phi Beta Kappa

- Lead counsel in multi-million-dollar dispute involving claims against client to "pierce the corporate veil" resulting in favorable pre-trial rulings and settlement
- Lead counsel at trial in multi-million-dollar dispute involving claims of "software malpractice" on client's counterclaim resulting in successful settlement for client during trial
- Risk management of pre-litigation disputes of a broad range of matters including complex contract disputes, pharmaceutical development and licensing agreements, non-compete and trade secrets issues, and environmental contamination matters
- Management and primary counsel on \$100 million+ pharmaceutical development dispute for defendant client resulting in partial summary judgment for client followed by a favorable settlement
- Trial counsel in multi-million-dollar brain injury case where jury verdict was obtained on behalf of our plaintiff client
- Lead counsel and management of complex environmental Superfund cost recovery action for client in an action involving more than 100 defendants

## HONORS & AWARDS

- *North Carolina Lawyers Weekly* "Leader in Law" (recognizing "the most influential individuals within our state's legal community") (2014)
- Defense Research Institute (DRI) nationwide award for Exceptional Performance (recognizing work for "having contributed to the improvement of the administration of justice in the public interest") (2013)
- Defense Research Institute (DRI) State Association Diversity Award (awarded to the North Carolina Association of Defense Attorneys during Chris'

Presidency for demonstrating a "significant commitment to diversity") (2012)

- *Benchmark Litigation*, North Carolina State Litigation Star (2010-2019)
- *The Best Lawyers in America*®, Commercial Litigation, Litigation - Environmental (2013-2020)
- *Business North Carolina's Legal Elite*, Litigation
- *Chambers USA: America's Leading Business Lawyers*, Litigation: General Commercial (2014-2019)
- Martindale-Hubbell AV Preeminent Rating
- North Carolina *Super Lawyers* (2007-2019)
- North Carolina *Super Lawyers*, Top 100 Lawyers (2013-2016)
- North Carolina *Super Lawyers*, Top 25 Raleigh Super Lawyers (2014)

## PROFESSIONAL & COMMUNITY AFFILIATIONS

- North Carolina Chamber Legal Institute
  - Chair of the Board (2015-Present)
- M&F Bank (Mechanics and Farmers Bank)
  - Board of Directors (2015-2019)
- North Carolina Chamber
  - Board of Directors (2014-Present)
- National Defense Research Institute
  - Chair, Trade Secrets Group (2013-Present)
- North Carolina Association of Defense Attorneys
  - Board of Directors (2006-2014)
  - Immediate Past-President (2013-2014)
  - President (2012-2013)

- President-Elect (2011-2012)
- Executive Vice President (2010-2011)
- Treasurer (2009-2010)
- Secretary (2007-2009)
- Chairman, Commercial Litigation Section (2005-2007)
- North Carolina Hillel
  - Board of Directors (2016-Present)
- Pro Bono General Counsel, The Lerner Jewish Community Day School (2002-Present)
- North Carolina Bar Association
  - Law School Liaison Committee (2008-2013)
- Tenth Judicial District Fee Dispute Committee (2007-2013)
- Association for Corporate Growth/Research Triangle Park Chapter
  - Board of Directors (2001-2006)
  - Vice-President (2003-2006)
- American Bar Association
- Wake County Bar Association

# **Boomers, Bots and Gen Z**



## *Boomers, Bots and Gen Z*

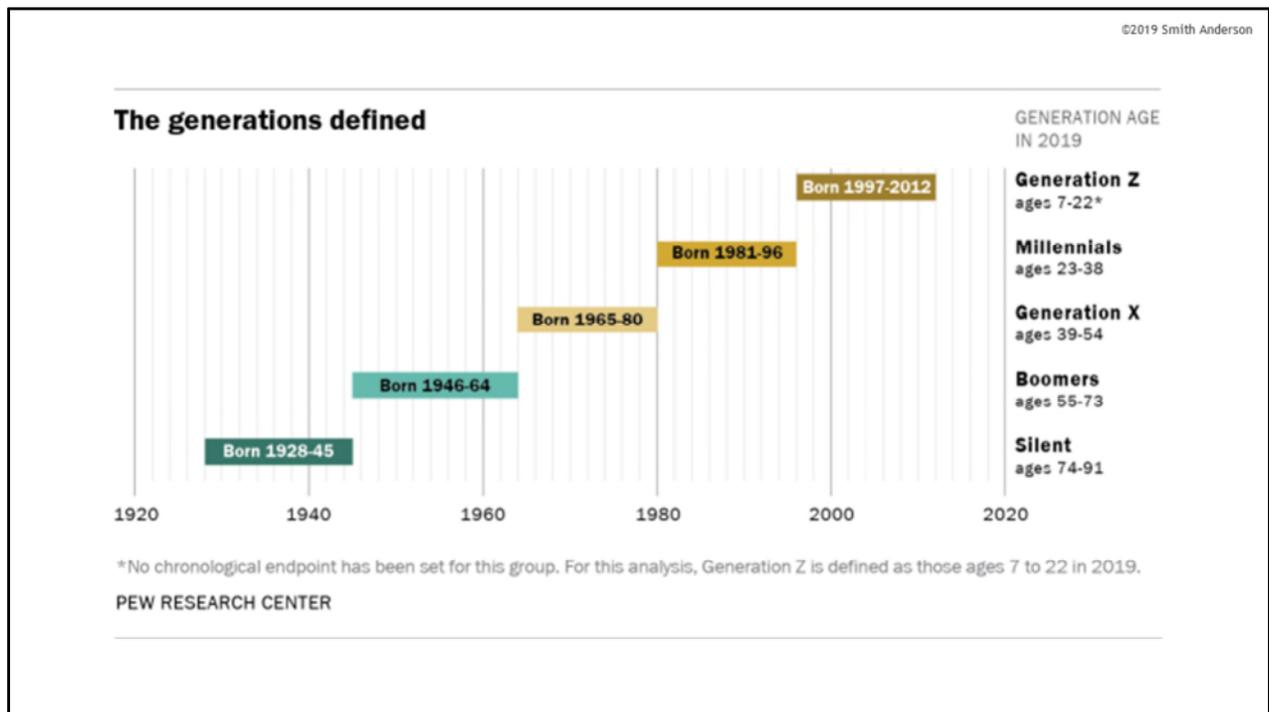


Kimberly J. Korando

Taylor M. Dewberry

**EXPECT EXCELLENCE®**





- The PEW Research Center (“PEW”) has spent over a decade studying the Millennial Generation. <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/>
- In 2018, PEW decided that it was time to determine the cutoff between the Millennial Generation and Gen Z. *Id.*
  - Millennials are those that are born between 1981 and 1996 (ages 23 – 38).
  - Generation Z are those that are born between 1997 and 2012 (age 7 – 22).
- Generational divides are not arbitrary but defined by shared political, economic, and social factors that define the generation’s formative years. *Id.*

## Defining Historical Events Shaping Gen Z

- No memory/limited memory of the September 11<sup>th</sup> attacks
- The iPhone and other smart devices
- Google and other instant search engines
- Changing family dynamics
- Parents directly impacted by the 2008 recession

- Gen Z has little or no memory of the September 11, 2001 terrorist attacks, but the “War on Terror” has always been the norm for them. <https://www.xyzuniversity.com/ready-or-not-here-we-come/> (the full White Paper is available within the link that provides interesting and relevant statistics on Gen Z).
- The smartphone/iPhone has always been a staple in Gen Z’s life. *Id.*
  - 96% of Gen Zers own a smartphone and 68% owned a smartphone by age 12. *Id.*
- Gen Z has never known life without Google’s search engine. *Id.*
- Gen Z has grown up in a world where they receive instant test results and feedback via an online grading portal. <https://www.shrm.org/hr-today/news/hr-magazine/1118/pages/a-16-year-old-explains-10-things-you-need-to-know-about-generation-z.aspx>
- The concept of family is much more diverse in Gen Z, the “traditional nuclear model” (two parents, married, with children) represents only 46% of American households. *See XYZ White Paper, page 2.*
- Most of Generation Z’s parents are Gen Xers (age 39 – 54). Gen Xers have lived through four recessions, struggled with debt, and watched Millennials graduate into a recession saddled with significant amounts of debt. These parents pass these financial experiences and lessons on to their children. *Id.*

# Defining Characteristics of Generation Z



- Skepticism
  - Gen Z has been exposed to a significant amount of economic malaise and political disruption.
  - Gen Z has been exposed to the global flaws and issues of the world, making them much more skeptical and cautious than other generations. (See XYZ White Paper, page 6).
- Individualism
  - Gen Z prefers to be off-beat and quirky and take pride in being unique individuals and they are very self-assured. *Id.*
  - Gen Z actually prefers a private workplace and to work individually. See SHRM Article.
- Entrepreneurial/Financially Focused (See XYZ White Paper from previous slide's notes).

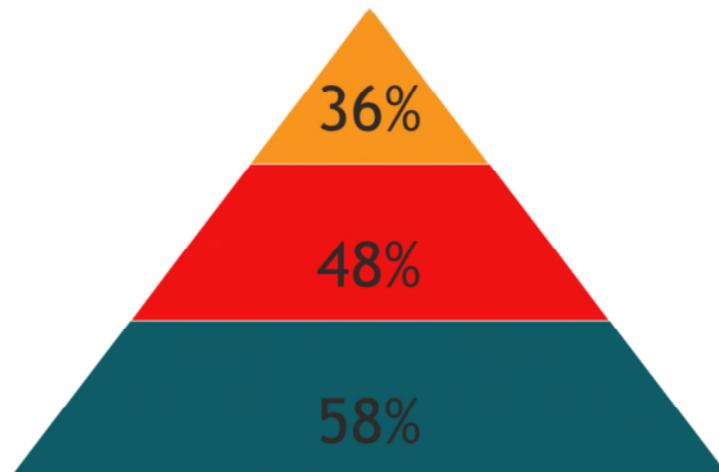
- 77% of students in grades 5 – 12 wanted to be their own boss.
- 58% of this generation wants to own their own business.
- 14% of them already own their own business.
- Vocal
  - Social Media/Technology enables them to find ways to get their message out more broadly.
  - The students of Marjory Stoneman Douglas High School organizing a political movement around gun control is one example of a real life impact of Gen Z's ability to affect change. *See SHRM Article.*
- Connected
  - The evolution of social media has given Gen Z the ability to interact with and be closer to their heroes than ever before.

## Gen Z v. Millennials

Millennials	Gen Z
Searches for Purpose through Career	Seeks Stability and Views Career as a Means to Make a Living
Prefers Community Workspace	Prefers Individual Workspace
Idealistic	Pragmatic
More Focused on Experience	More Focused on Saving Money
Ineffective Multi-taskers	More Efficient Multi-taskers
Diverse	More Diverse

- There are several differences between the way Millennials and Gen Z relate to co-workers and interact in the workplace.
- Millennials chase their passions and dreams (to where they may lead), whereas Gen Z was raised to be more practical about career. *See XYZ White Paper, page 5.*
- Gen Z prefers a place in the office to work independent, while Millennials prefer a more communal style. *Id.*
- Gen Z prefers human interaction and engagement in the workplace. They prefer face to face interactions. *See SHRM Article.*
- Gen Z can more quickly and efficiently shift between work and play and concentrate on multiple tasks at once. For example, they make take notes on a notepad, then finish in front of a TV with a laptop, while face-timing a friend.  
[https://www.huffpost.com/entry/8-key-differences-between\\_b\\_12814200](https://www.huffpost.com/entry/8-key-differences-between_b_12814200)
- Gen Z is the last generation in U.S. history where the majority of the population is white. Diversity for them is the norm.  
<https://www.npr.org/2018/11/15/668106376/generation-z-is-the-most-racially-and-ethnically-diverse-yet>

## By the Numbers



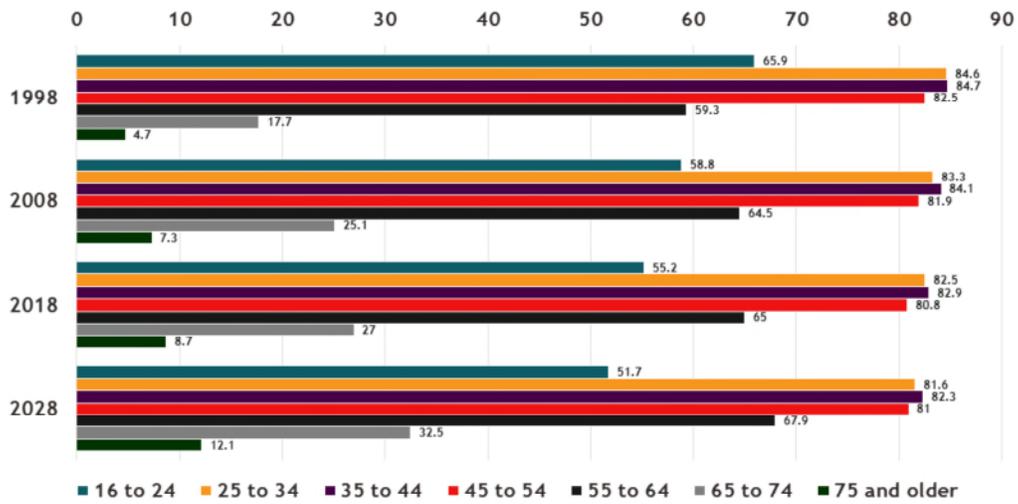
- By 2020, Gen Z will account for 36% of the workforce. *See SHRM Article.*
- Millennials and Gen Z make up 48 percent of managers, directors, or higher. <https://www.cnbc.com/2019/03/05/how-millennials-and-gen-z-are-reshaping-the-future-of-the-workforce.html>
- Millennials and Gen Z will make up 58 percent of the workforce over the next decade. *Id.*

## How to Keep Gen Z

- Place a greater emphasis on compensation and benefits
- More face-to-face contact
- Setting practical goals and check-ins
- More opportunities for entrepreneurship
- More leadership positions or roles on the team
- Better databases of online learning and trainings

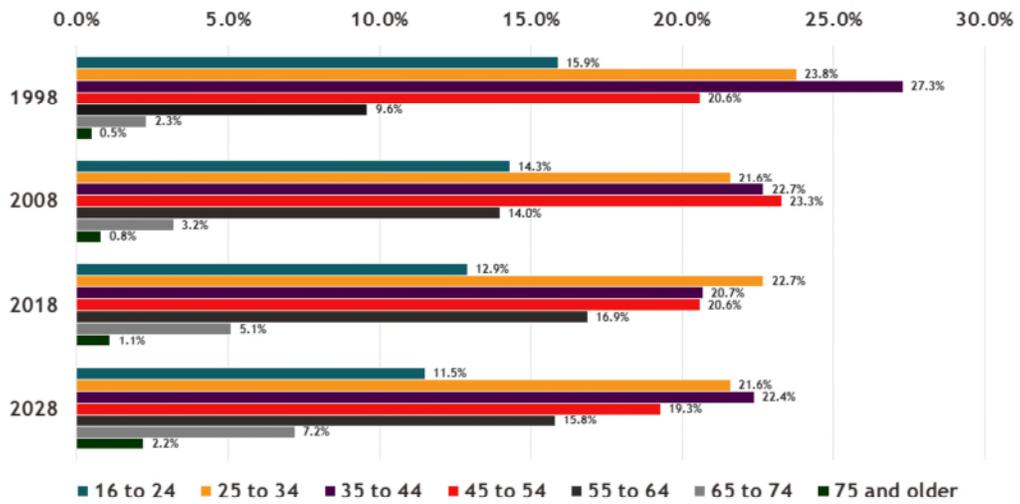
- Financial stability takes precedence for Gen Z. (2 out of 3 Gen Zers would rather have a job that offers financial stability than one that they enjoy. *See SHRM Article.*
- In survey, 43% of Gen Zers reported that face-to-face communication was their preferred mode of communication. This was followed by text communication at 24%. *See XYZ White Paper, page 13.*
- “Employers need to recognize that Gen Zs will likely crave structure, goals, challenges, and a way to measure their progress.” *Id., page 12.*
- Gen Z’s preferred mode of education is through YouTube.  
<https://edscoop.com/generation-z-learning-youtube-video-pearson-study/>

## Labor Force Participation Rates by Age



SOURCE: Bureau of Labor Statistics (9/4/19)  
<https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm>

## Civilian Labor Force by Age



SOURCE: Bureau of Labor Statistics (9/4/19)  
<https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm>

## Risk Management Threats

Human  
biases/assumptions:  
interviewing, hiring,  
assessment and  
development

Algorithms used by  
job search sites

Ageist  
comments/records

# Workforce and Succession Planning

## Biases and Assumptions

- Basing decisions on assumption that employee will retire soon or at particular time based on his/her age (e.g., job assignment, development opportunities, training)
- Hiring or retaining a younger worker based on assumption they are more likely than older workers to stay longer

## Ageist Comments and Records

- Making age-specific comments, inquiries (e.g., “You’re [64], how much longer are you going to work?”)
- Displaying employee name and age on succession planning documents

## Best Practice

- Conduct regular “engagement interviews” (i.e., stay interviews) with ALL employees

“Succession plan was to hire or retain younger workers at the expense of older workers because it was more likely that the former would stay with the company longer than the latter.” *Sharp v. Aker Plant Servs. Group*, 726 F.3d 789, 801 (6th Cir. 2013) (reversing grant of summary judgment to employer because “reasoning suggests no analytical path that strays from an age-based rationale”)

“Age was listed as a prominent component, usually delineated next to an employee’s name” in succession planning documents. *Finch v. Hercules Inc.*, 941 F. Supp. 1395, 1411 (D. Del. 1996) (denying employer’s summary judgment motion where)

“You’re [age] how much longer are you going to work?” *Smith v. Chester Co. Bd. Of Educ.*, 218 F. Supp. 3d 619 (W.D. Tenn. 2016) (direct evidence of age discrimination)

### Engagement Interview Implementation Tips

1. The first interviews should be conducted by the top executive and cascaded down throughout the organization to first-line supervisors and their direct reports. Each leader's interview performance becomes a role model for each subordinate leader.
2. Interviews should be conducted in person rather than remotely and scheduled for no more than 20 minutes.
3. Employees should be given advance notice that their supervisor will schedule individual interviews with each employee to learn what they can do to help every employee stay longer and feel fully engaged at work and that the focus will be on

things the supervisor can influence or control versus issues that relate to broader company policies.

4. Interviews should focus on identifying specific improvements that raise the individual's level of engagement and be focused solely on what the supervisor can do for the individual. The interviews should not evolve into coaching the employee on their own performance. Interviews should not be part of performance evaluations or check-ins.
5. Do not send questions in advance. Here are some suggestions for talking points:

I would like to talk with you about what keeps you here at [Company Name] so I understand what I might be able to do to make this a great place to work for you.

I'd like to understand your perspective on what I can do to support you as your manager, particularly with issues within my control.

[Choose from among the following or similar questions]:

What do you look forward to when you come to work each day?

What do you like most or least about working here?

What keeps you working here?

If you could change something about your job, what would that be?

What would make your job more satisfying?

How do you like to be recognized?

What talents are not being used in your current role?

What would you like to learn here?

What motivates (or demotivates) you?

What can I do to best support you?

What can I do more of or less of as your manager?

What might tempt you to leave?

To conclude the interview, summarize the key reasons the employee gave for staying or potentially leaving the organization, and work with the employee to develop a plan. Be sure to end on a positive note. Close with something along the lines of,

Let me summarize what I heard you say about the reasons you stay at [Company Name] as well as reasons you might leave. Then, let's develop a plan to make this a great place for you to work.

I appreciate you sharing your thoughts with me today. I am committed to doing what I can to make this a great place for you to work.

6. Avoid treating older workers differently or as if they don't have the same career opportunities as other workers.

SHRM, How to Conduct Stay Interviews: Core Features and Advantages (August 2018)

(<https://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/Stay-Interview-How-To.aspx>)

Columbia University,

<https://humanresources.columbia.edu/sites/default/files/content/Toolkit/Stay%20Interview%20Questions.pdf>

## Boomer Retention

<i>Alternative Work Arrangements</i>	Flex-scheduling around core hours
	Part-time schedule (traditional, non-traditional)
	Seasonal
	Job-sharing
	Sabbaticals
	Phased retirement
	Voluntary transition benefits

### Phased Retirement Tips

Employers seeking to implement phased retirement options should consider the following:

- Adopt clearly articulated criteria for eligibility, such as tenure or position in the company.
- Detail duties, authority and how these will be transitioned to others over the phased retirement period.
- Determine and communicate how any reduction in work hours will impact pay and eligibility for employee benefits, including health insurance, vacation time, retirement plans, paid holidays and so on.
- Set an end date at which point the employee retires fully to avoid the employee seeking to continue the arrangement beyond a mutually agreed upon date documented with a letter of resignation post-dated on the program end date.

## Training and Retraining Tips

### *Training Delivery*

Pace and  
segmenting

Sensory  
accommodation

Technology

#### **Pace**

Self-paced training accommodates variations in speed at which employees learn.

#### **Vision**

Small print, content printed on glossy paper, or low-contrast colors (e.g., blues and greens) can be difficult to read. Use training materials with large print (at least 12-point font) and high-contrast colors. Display slides and visual aids at eye-level to accommodate those who wear bifocals.

#### **Hearing**

Avoid soft or high-pitched sounds, reduce ambient noise and provide assistive listening devices (small hand-held amplifiers) for participation in meetings.

#### **Technology**

Some may be unfamiliar with technology jargon, certain digital equipment and newer applications and may hesitate to ask for help to avoid being judged.

# Hiring and Recruitment Risky Business

## Recruiting

Posting for: “college student,” “recent college graduate,” or “digital natives”

New hire target percentage for: “graduate or early career” candidates

Recruitment system for entry-level positions requiring applicants be affiliated with a university

Posting on Facebook and other platforms that target ads to specified age ranges (such as ages 18 to 40, or ages 22 to 45) resulting in older workers not seeing the ads

## Screening

Screening in: applicants 2-3 years out of college and with 1-2 years’ experience,

Screening out: applicants with 8-10 years’ experience

Job posting describing complex tasks and substantial independence, but stating candidates should have “no more than 7 years” of relevant experience

Screening out: for “over qualified”

Hiring guidelines “75% of new hires be graduate or early career” *Forsyth et al. v. HP, Inc.*, Docket No. 5:16-cv-04775 (N.D. Cal. Aug. 18, 2016) (motion to dismiss denied)

Resume-review guidelines used in recruiting for the Territory Manager position included preferred years-of-experience ranges that screened out applicants over 40. The guidelines allegedly directed recruiters to target applicants 2-3 years out of college and with 1-2 years of sales experience, to “stay away from” applicants who had been in sales for 8-10 years, and to look for applicants who “adjust[] easily to change.” *Villarreal v. R.J. Reynolds Tobacco Co.*, Docket No. 15-10602 (11<sup>th</sup> Cir. Feb. 11, 2015) (dismissed on other grounds)

A near-exclusive reliance on a recruitment system for entry-level accounting positions that requires applicants to be affiliated with a university and a focus (illustrated by recruiting materials and statements by management) on attracting and retaining “Millennials,” *Rabin v. Pricewaterhouse Coopers LLP*, Docket No. 3:16-cv-02276 (N.D. Cal. Apr. 27, 2016) (JOP motion denied)

Job announcement described a role including complex tasks and substantial independence, but nonetheless stated that candidates should have “no more than 7 years” of relevant experience. *Kleber v. CareFusion Corp.*, Docket No. 1:15-cv-01994 (N.D. Ill. Mar. 5, 2015) (motion to dismiss disparate treatment claim denied)

Posting for college student or recent college graduate. *Hodgson v. Approved Personnel Service, Inc.*, 529 F. 2d 760 (4<sup>th</sup> Cir. 1975) (court more or less agreed with the EEOC, holding that an employment agency advertisement inviting only “recent college grads” or “recent high school grads” to apply to a specific employment opportunity violated the ADEA, since “there is an implication that persons older than the normal ‘recent graduate’ need not apply.”)

Employers and employment agencies are illegally targeting their employment ads on Facebook to exclude older workers who fall outside specified age ranges (such as ages 18 to 40, or ages 22 to 45), purposely preventing these older workers from seeing the ads or pursuing job opportunities. *Communication Workers of America et al. v. T-Mobile US Inc., et al.*, Case No. 5:17-cv-07232 (N.D. Cal. 2017)

## Hiring and Recruitment Risky Business

*And then there's Google...a recruiting system that:*

- collects age-related data
- emphasizes abstract, theoretical interview questions (of the type currently taught and tested in school)
- discounts real-world experience
- uses higher standards for older applicants (e.g. asks harder technical questions)
- emphasizes “googleyness” or cultural fit—a euphemism for youth?

*Heath v. Google LLC*, Docket No. 5-15:cv-01824 (N.D. Cal. Apr. 22, 2015) (dispositive motions denied)

## Hiring and Recruitment

To  
attract  
Boomers

- Post for: “mature,” “experienced” or “reliable”
- Post on <http://www.seniorjobbank.org/>
- Include older workers in web site and other imagery
- Create partnerships with organizations that target 50+ demographic

The Equal Employment Opportunity Commission (EEOC) approves of employers targeting older workers for employment purposes.

Some states' law have been interpreted to protect younger employees from age discrimination. These states include:

- Florida, Fla. Stat. Sect. 760.10
- Michigan, M.C.L. § 37.2202(1)(a), M.C.L. § 37.2103(1)(a), *Zanni v. Medaphis Physician Service Corp.*, 612 N.W.2d 845, 847 (Mich. Ct. App. 2000)
- Minnesota, Minn.Stat. § 363A.08 Subds. 1, 2, 2.2 and *Ace Elec. Contrs. v. IBEW, Local Union No. 292*, 414 F.3d 896, 902-03 (8th Cir. 2005) New Jersey, N.J.S.A. 10:5-4; N.J.S.A. 10:5-12(a) and *Bergen County Commercial Bank v. Sisler*, 723 A.2d 944, 957 (N.J. 1999)
- New York, New York Laws Article 15 - (Executive) HUMAN RIGHTS LAW 296 3-a and *McLean Trucking Co. v. State Human Rights Appeal Bd.*, 437 N.Y.S.2d 309 (1st Dept. 1981)
- Oregon, ORS 659A.030(1)(a), *Ogden v. Bureau of Labor*, 699 P.2d 189,192 (Or. 1985)

## Hiring and Recruitment

### *EEOC Advice to Employers:*

- Avoid limiting qualifications based on years of experience (*or age!*)
- Include age-diverse photos, graphics, and content
- Train recruiters and interviewers to avoid ageist assumptions
- Avoid assumptions on the return on investment of millennial versus older workers (*millennials are leaving their employers on average after three years*)
- Have age-diverse interview panels

The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act (ADEA), Victoria Lipnic, Acting Chair U.S. Equal Employment Opportunity Commission, June 2018, p. 4.

<https://www.eeoc.gov/eeoc/history/adea50th/upload/report.pdf>

## Creating Cohesion Between Generations in the Workplace

- Employees/people have a natural tendency to seek out colleagues in their own age group
- Cross-generational mentorship
  - Collaboration
  - Pass information about the profession, the company, and the industry
  - Updates about industry trends and globalization

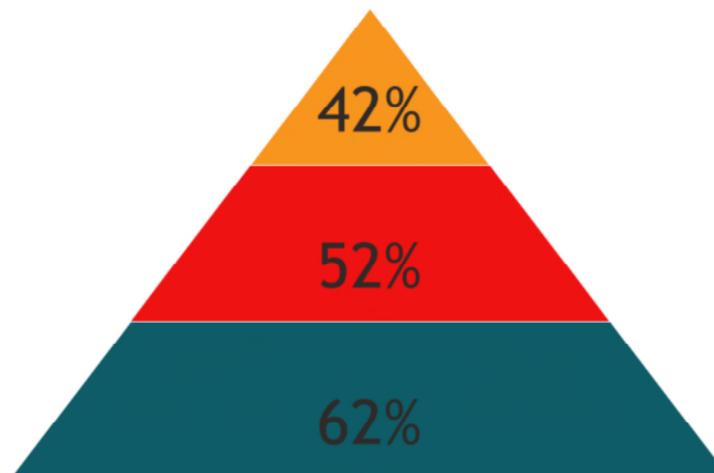
- There are roughly four generations employed in the workforce today – Baby Boomers, Generation X, Millennials, and Generation Z. Engaging each generation of employees is not an easy task. <https://www.itagroup.com/insights/baby-boomers-gen-z-what-know-about-employee-disengagement-across-generations-workplace>
- Human Resources teams will have to understand both how to properly manage and motivate a potential 50-year generational gap and how to leverage the organization's multi-generational workplace. <https://www.retaildive.com/news/from-traditionalists-to-gen-z-managing-a-multigenerational-retail-workforc/561703/>
- Employers should leverage cross-generational mentorships to foster innovative solutions and pass along valuable information. [https://www.kellyservices.us/us/business\\_services/business-resource-center/managing-employees/pairing-gen-z-with-baby-boomers-the-value-of-cross-generational-mentoring/](https://www.kellyservices.us/us/business_services/business-resource-center/managing-employees/pairing-gen-z-with-baby-boomers-the-value-of-cross-generational-mentoring/)

## Focus on Commonalities

- We have more in common than we may think
- Beliefs that we are different create increased generational divides in the workplace
- Age Stereotypes and Meta-stereotypes affect these interactions

- We have more in common than we might think – several psychologists have studied over 20 different studies with 20,000 people and this revealed only small inconsistent differences in job attitudes when comparing generational groups. <https://hbr.org/2019/08/generational-differences-at-work-are-small-thinking-theyre-big-affects-our-behavior>
- The issue may lay in what we think are the actual differences between groups and this may get in the way of how we collaborate with people. *Id.*
- Stereotypes are the general assumptions that we make about a group/groups of people that have shared characteristics. An example is that older workers are responsible, hard-working, and mature. *Id.*
- Meta-stereotypes instead look at what we think others believe about us based on our age group. An example of this is a young person might worry that other people think they are narcissistic, even if the other people are not actually thinking this. *Id.*
- Talking openly about these stereotypes and meta-stereotypes can be a great way to unpack some of these issues. *Id.*

## By the Numbers



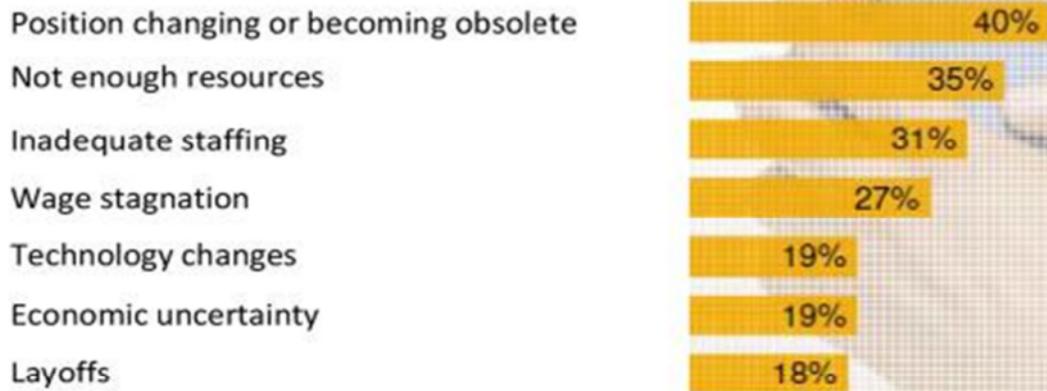
World Economic Forum predicts that machines will do 42% of labor by 2022 and 52% by 2025. *Shock report: Machines will do half our labor in less than 8 years*, <https://www.axios.com/robots-will-account-for-half-of-labor-by-2025-39993218-e6a7-4d3d-9b7f-ed712bce3fea.html>.

A recent McKinsey Global Institute survey found that 62% of corporate executives believe that they will need to retrain or replace more than a quarter of their workforces between now and 2023 due to advancing automation and digitization. *McKinsey survey of executives: Retraining and reskilling workers in the age of automation* (January 2018), <https://www.mckinsey.com/featured-insights/future-of-organizations-and-work/retraining-and-reskilling-workers-in-the-age-of-automation>.

McKinsey Global Institute estimates that, by 2030, as many as 375 million workers— or roughly 1 out of 7 of workers worldwide—may need to switch occupational categories as digitization, automation, and advances in artificial intelligence disrupt the world of work. *Jobs lost, jobs gained: Workforce transitions in a time of automation*, [https://www.mckinsey.com/~/\\_media/mckinsey/featured%20insights/future%20of%20organizations/what%20the%20future%20of%20work%20will%20mean%20for%20jobs%20skills%20and%20wages/mgi-jobs-lost-jobs-gained-report-december-6-2017.ashx](https://www.mckinsey.com/~/_media/mckinsey/featured%20insights/future%20of%20organizations/what%20the%20future%20of%20work%20will%20mean%20for%20jobs%20skills%20and%20wages/mgi-jobs-lost-jobs-gained-report-december-6-2017.ashx).



### What do people worry about most at work?



SHRM Foundation, *Harnessing the Power of a Multigenerational Workforce* (2017)



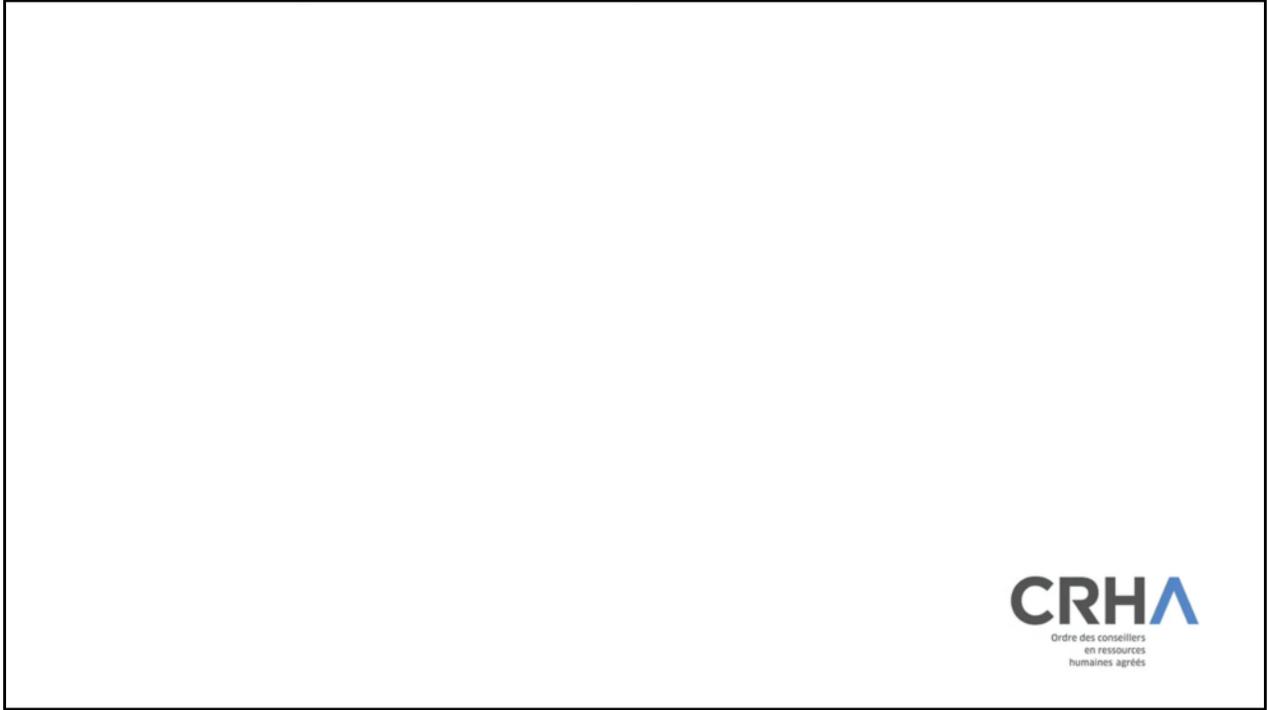
## Will a Robot Take My Job?

Enter your occupation



Source: McKinsey&Company

<https://willrobotstakemyjob.com/>

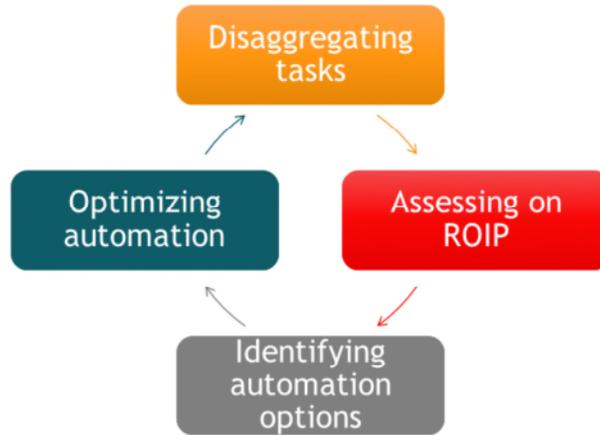


Reinventing Jobs: A 4-Step Approach for Applying Automation to Work, Ravin Jesuthasan and John W. Boudreau (Harvard Business Review Press 2018)

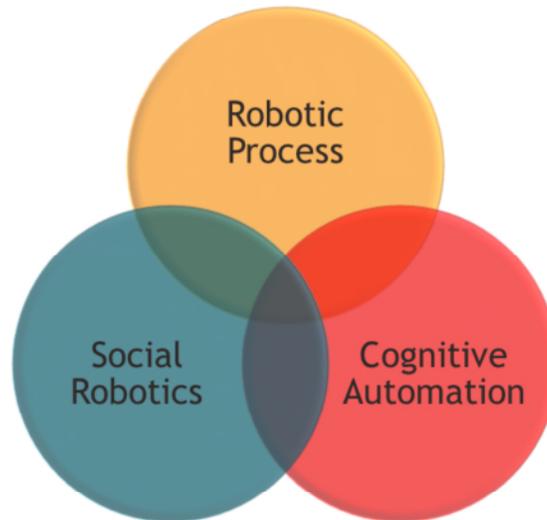
## HR Role



## 4-Steps of Reinventing Jobs



## 3 Types of Automation



3 types of automation:

- Robotic process automation: automates high-volume, low complexity, routine administrative white-collar tasks
- Cognitive automation: automates more complex tasks by applying things like pattern recognition or language understanding to various tasks. E.g., chatbots
- Social robotics: Robots moving autonomously and interacting with humans through sensors, AI, mechanical robots. E.g., driverless cars



You can knit a sweater by the fireside  
Sunday mornings go for a ride  
Doing the garden, digging the weeds  
Who could ask for more

*Will you still need me, will you still feed me  
When I'm sixty-four*

Every summer we can rent a cottage  
In the Isle of Wight, if it's not too dear  
We shall scrimp and save  
Grandchildren on your knee  
Vera, Chuck and Dave

Send me a postcard, drop me a line  
Stating point of view  
Indicate precisely what you mean to say  
Yours sincerely, wasting away

Give me your answer, fill in a form  
Mine for evermore  
*Will you still need me, will you still feed me  
When I'm sixty-four*



## *Boomers, Bots and Gen Z*



Kimberly J. Korando

Taylor M. Dewberry

**EXPECT EXCELLENCE®**

# **Recognizing and Avoiding Common Mistakes Under the FLSA**



**Recognizing and Avoiding  
Common Mistakes Under  
the FLSA**

//////  
Susan Milner Parrott  
Kerry A. Shad

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**Why Is Compliance (Avoidance of  
Mistakes) Important?**

DOL Wage and Hour Division (“WHD”)

- Recovered a record \$304 million in 2018;
- More than \$1.2 BILLION in the past five years;
- WHD is conducting outreach for employees and employers (3,600 events in 2018).

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**Private Actions**

- Continued growth in class-action litigation.
- Attractive for plaintiffs’ lawyers because liquidated damages and attorneys’ fees are often included.
- Significant liability exposure for employers.
- Focus on prevention; spend money on compliance rather than litigation.

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## Common Mistakes

- Classification (Independent Contractor or Employee; Exempt/Non-Exempt)
- Not Paying for All Time Worked
- Calculation of Regular Rate and Overtime

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## Classification as Independent Contractor or Employee—the “Gig Worker”

- Independent contractors are not covered by the FLSA (not entitled to minimum wage or overtime).
- DOL guidance April 2019 opinion letter (economic reality and economic dependence).

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## Six Factors to Consider When Determining Economic Dependence of a Worker

- Control
- Permanency of relationship
- Investment in facilities, equipment, or helpers
- Skill, initiative, judgment, and foresight required
- Opportunity for profit and loss
- Integrality

DOL Opinion Letter FLSA2019-6

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## Classification as Exempt or Non-Exempt

- Avoid non-exempt/exempt misclassification:
  - Know the exempt classifications and the requirements for each.
  - Review your current practices—self-audit.

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## “White Collar” Exemptions

- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
  - Executive;
  - Administrative;
  - Professional; or
  - Outside Sales capacity.

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## “White Collar” Exemptions

- Certain computer employees may be exempt professionals under Section 13(a)(1) or exempt under Section 13(a)(17) of the FLSA.
- Highly-Compensated Employee (Meets the salary level and has one or more exempt duties of one of the white collar exemptions).

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## “White Collar” Exempt Status Requires:

- Payment on a salary basis (no improper deductions).
- Salary of at least the legally-required amount.
- Satisfaction of the job duties for a particular exemption.

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## Common Problems

- Basing exempt status on job description alone.
  - Actual duties govern.
- Job titles are not determinative.
  - “Scientist” or “lab technician.”

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## Common Problems

- Not all supervisors are exempt.
  - Can she really be involved in hiring/firing?
  - Is the supervisor more like the “lead foreman?”
- Not all employees who work with computers are exempt.
  - Help desk personnel are generally non-exempt.
- Not all health professionals are exempt.
  - An RN paid by the hour is non-exempt.

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## Common Practices that Could Jeopardize Exempt Status

- Improper deduction from salary.
- “Comp” time and hourly-based bonuses (permissible for exempts, but caution warranted).

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## Not Paying for All Time Worked

- “Work Time” under the FLSA is all time during which an employee is required to be on the employer’s premises, on duty, or at a prescribed work place (29 C.F.R. § 785.7).
- Unauthorized overtime—lack of prior authorization does NOT relieve employer of obligation to pay for time worked.

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## Not Paying for All Time Worked (cont’d)

- Travel Time
- Training/Meeting Time
- Work From Home by Non-Exempts
- On-Call Time
- Meal Breaks

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## Travel Time

- Ordinary home to work travel is not normally work time (29 C.F.R. § 85.35).
  - If an employee is required to report to a location to receive instructions or pick up equipment, travel from that place to the job is work time and must be paid.
- Travel between job sites during normal work day is work time (29 C.F.R. § 785.38).

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## Travel Time

- Travel for special one-day (no overnight stay) assignment in another city is work time (29 C.F.R. § 785.37).

*Example:* Employee lives in Raleigh and must fly to Philadelphia on a special one-day assignment. Work time begins when she arrives at the RDU airport and ends when she leaves the RDU airport to return home.

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## Travel Time

- Overnight travel away from home.
  - Travel time is work time only when it cuts across the employee's workday (regular workday hours and same hours on non-work days) (29 C.F.R. § 785.39).

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## Travel Time

- Travel time outside regular working hours as a passenger on a plane, bus, boat, or train is not work time (29 C.F.R. § 785.40).
  - Employer can require such travel and avoid paying for travel time.

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## Training and Meeting Time

Pay for time spent attending training programs and meetings unless:

- Attendance is outside of the employee's regular working hours;
- Attendance is voluntary;
- The training or meeting is not directly related to the employee's job; and
- The employee does not perform any productive work while attending the meeting or program.  
(29 C.F.R. § 785.27)

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## Work from Home or Outside of Regular Hours

Monitor non-exempt employees who:

- Work through lunch;
- Take job-related telephone calls at home or outside regular work hours;
- Take work home;
- Send/receive job-related email messages at home or outside regular work hours; and/or
- Work before or after regular work hours.

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## Calculation of Regular Rate and Overtime

- Generally, overtime pay is 1.5 x the “regular rate” for all hours over 40 in a “workweek.”
- “Workweek” is seven consecutive 24-hour periods, 168 hours; beginning and ending of the “workweek” is established by the employer. (29 C.F.R. § 778.105)

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## “Regular Rate”

- All compensation received for work in the workweek.
  - Examples of includable compensation:
    - Non-discretionary bonuses
    - Shift differentials
    - On-call pay
  - Examples of excludable compensation:
    - Discretionary bonuses
    - Premium pay
    - Holiday pay

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## New Rule to Clarify and Update Regular Rate Regulations

- DOL announced in March 2019 a proposed rule.
- Rule focuses on clarifying whether certain perks and benefits must be included in the regular rate.
- For example, employers may exclude:
  - cost of wellness programs and employee discounts;
  - payments for unused leave.

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## Examples of Regular Rate and Overtime

- Fixed salary for fixed workweek over 40
  - Half-time for hours between 40 and weekly scheduled maximum, 1½ times for hours over the scheduled maximum.
- Employee working two or more rates
  - Weighted average or, by agreement, rate for the job performed in the overtime hours (29 C.F.R. § 778.115).

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## Miscalculation Can Be Expensive

- Fourth Circuit Decision - February 2019 -- \$1.6 million (back pay and liquidated damages).
- “Hitch rate” and 29 C.F.R. 778.309; court looked beyond contractual agreement to actual pay practices and determined that the “blended rate” was applied “regardless of the number of hours worked” even when the worker did not work overtime, thus, the “blended rate” was the regular rate and should have been used to calculate overtime.
- *Dept. of Labor v. Fire & Safety Investigation Consulting Services, LLC* 915 F.3d 277 (4th Cir. 2019)

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## Joint Employment

DOL proposed rule (4 factor test)

- Hires or fires the employee;
- Supervises and controls the employee’s work schedule or conditions of employment;
- Determines the employee’s rate and method of payment; and/or
- Maintains the employee’s employment records.

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## Joint Employment

- Potential joint employer must *actually exercise* (directly or indirectly) one or more of these types of control
- If the entity simply has the contractual right or authority to exercise such but it *never actually exercises this control*, it will generally *not* be deemed to be a joint employer under the DOL's new proposed test.

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## Joint Employment

- Requiring a business partner to institute workplace safety measures, wage floors, or sexual harassment policies would not result in “joint employment.”

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## Recognizing and Avoiding Common Mistakes Under the FLSA

Susan Milner Parrott  
Kerry A. Shad

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**When Work and Employee Health  
Intersect: Key Issues Under  
Federal and State Disability  
and Leave Laws**



## When Work and Employee Health Intersect: Key Issues Under Federal and State Disability and Leave Laws



Rosemary Gill Kenyon

**EXPECT EXCELLENCE®**

# ADA Challenges

## Litigation Trends

- Lawsuits increasing in number
- EEOC strategic focus on disability
  - 36 disability lawsuits filed in September 2019 (of total of 86)
  - Focus on inflexible policies or practices (e.g., leave, 100% healed policies), qualification standards and medical inquiries that screen out disabled
- Disability harassment claims increasing
- Employer mistakes and lack of process provide fertile ground for lawsuits

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### Key Employer Obligations under the ADA:

- **No discrimination**
  - Individuals with disabilities or who are regarded as being disabled
- **Reasonable accommodations**
  - Known disabilities of applicants and employees
  - Unless doing so would constitute an undue hardship or the individual would pose a direct threat to the health or safety of the individual or others
- **Confidentiality**

### Reasonable Accommodation Process: Interactive Process

- Obtain medical information and documentation
  - Confirm disability
  - Understand intersection of health and job
- Consider essential functions
- Consider possible accommodations

# ADA Challenges

## Medical exams

- Individualized medical inquiries
- Establish disability and need for accommodation
- Safety and Direct Threat Concerns
  - Health, behavior or drug use (lawful and lawful-ish)

**Key questions: Why? Who? How?**

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*Employer properly relied on individualized medical exam to withdraw offer to an individual with a prosthetic leg. Woods v. Jefferds Corp., 2019 BL 67711 (West Virginia Supreme Court, February 2, 2019).*

*Jury verdict in favor of deaf employee removed from forklift position. Siewertsen v. Worthington Industries, Inc., 2019 BL 309716 (6th Cir. August 20, 2019).*

*Harris v. Union Pacific Railroad Co., WL-4894412 (N.D. Ill. September 30, 2019), employer requested a fitness-for-duty exam after employee complained about supervisor assigning him to erratic schedule. The court held that there were issues of fact about why the FFD exam was ordered and whether the employer had any legitimate concern for safety based on employee's behavior. Employee was out of work for 2 months, without pay.*

*EEOC v. BNSF Railway Company, \_\_\_ F.3d. \_\_\_, No. 16-35457 (9th Cir. August 29, 2019), the court held that BNSF improperly discriminated against a job applicant when it rescinded a job offer after the applicant refused to pay for additional medical test (MRI) based on a past injury. BDNG is seeking review by the U. S. Supreme Court.*

*EEOC v. McLeod Health, Inc., \_\_\_ F.3d. \_\_\_, 2019 WL 385654 (4th Cir. Jan. 31, 2019), the court held that a jury could decide that the employer did not have a legitimate concern for safety to support medical exam since employee had chronic medical condition which caused her to have mobility problems and fall occasionally, and recent falls were no different than usual.*

# ADA Challenges

## Avoid Blanket Rules - Leaves and Absences

- Individualized assessments required
- Avoid fixed rules on length of leaves or no-fault absenteeism policies
- Avoid 100% healed return-to-work rules
- Schedule flexibility may be a reasonable accommodation
- But, employers can manage abuse by careful attention

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*McCullen v. Union Pacific Railway*, NO. 19-1512 (8<sup>th</sup> Cir. 2019), *pending case*, in which McCullen alleges that Union Pacific discriminated against a more than 2,000 workers because they were disqualified in the hiring process due to being disabled, regarded as disabled or had a record of disability. McCullen, the putative class representative, claims that a conditional job offer was revoked after a prior injury from another employer was disclosed.

*Request for five more weeks of leave as a reasonable accommodation denied: Ruiz v. Paradigmworks Group, Inc.*, 2019 BL 358292 (9<sup>th</sup> Cir. 2019), court ruled that claim should proceed to a jury trial.

*EEOC settled with employer who had an inflexible 12-week leave policy and denied additional leave as a reasonable accommodation: EEOC v. Tallahassee Memorial Healthcare, Inc.*, (N.D. Fla. 2019).

*EEOC settled with employer who had an inflexible 90-day leave policy and denied additional leave as a reasonable accommodation: EEOC v. Carondelet Health Network*, No. 4:19-cv-00263 (D. Ariz. 2019).

*Severson v. Heartland Woodcraft*, 872 F. 3d. 476 (7<sup>th</sup> Cir. 2017), cert denied, 138 S. Ct. 1441 (2018). Court held that additional leave of 3 months after FMLA ran out is not reasonable under the ADA. It rejected the EEOC position that indefinite leave or extended leave is required under the ADA. The Court said the ADA is “not a leave statute.”

## ADA Challenges

### Employer driven changes in job duties or practices

- May trigger new requests for accommodations
- Example: Walmart People Greeters

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Several claims filed by Walmart People Greeters since Walmart decided three years ago to phase out the position and add more physical duties.

*Specific factual inquiry is necessary to determine whether new duty of administering immunizations is an essential function of a pharmacist's job: Noel v. Wal-Mart Stores, 2019 AD Cases 80641 (2<sup>nd</sup> Cir. 2019), a pharmacist with fear of needles sued.*

*Trial ordered in claim against Walmart for questioning the need for a permanent job coach after providing one for 17 years. EEOC v. Wal Mart Stores, Inc., 2019 BL 87119 (W.D. Wis. 2019). Note that several district courts have ruled that full time job coaches are not a reasonable accommodation.*

## ADA Challenges

### Common request for reasonable accommodations

- Reassignment to vacancy
- Excused from certain non-essential duties
- Schedule flexibility
- Working from home
- Others

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*Reassignment to a vacant position:* Recent cases ruled against employers for failing to or to reassign disabled employee to a vacant position. See e.g., *EEOC v., Walmart*, 2019 BL 301065 (D. Maine 2019); *Ryder v. Beaumont Health, Inc.*, 2019 BL 387315 (E.D. Mich. 2019).

*Mechanic may proceed to trial on ADA claim when he was fired after being diagnosed with insulin-dependent diabetes.* *Miller v. City of Lebanon Transit Authority*, 2019 BL 115735 (M.D. PA April 2, 2019). The court held that whether driving was an essential function was an issue of fact for the jury to decide.

*Knee replacement surgery is not a reasonable accommodation:* *Caraballo v. City of Jersey City Police Dept.*, 2019 BL 101646 (NJ Supreme Court, March 25, 2019).

*Service Animals: EEOC enforcement:*

- EEOC filed a lawsuit against Transport Corp. of America on August 20, 2019, for allegedly failing to allow a truck driver to use his trained service dog to help ward off panic attacks. *EEOC v. Transport Corp of America*, No. 0:19-cv-02300 (D. Minn.).
- EEOC settled a lawsuit against CRST International in which it alleged that the employer violated the ADA when it withdrew an offer to a truck driver who wanted to bring his service animal on his drives due to his PTSD. *EEOC v. CRST Int.*, No. 3:17-cv-00241 (M.D. Fla.)

## ADA Challenges

### Opioid Crisis

- Avoid blanket exclusions for prescription drugs
- Past addiction as a disability
- Current use of prescription may be indicative of a disability

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*Flores v. Entergy Nuclear Operations, Inc.*, 768 Fed. Appx. 139 (2<sup>nd</sup> Cir. May 28, 2019). Court affirmed summary judgment against a nuclear security guard whose employment was terminated after an arrest and charge of criminal possession of a controlled substance. Security guard filed a claim alleging, among other things, that he was regarded as disabled due to drug and alcohol use. “Insofar as Flores is arguably correct that Entergy regarded him as “disabled” on account of alcoholism or substance abuse, drug testing and counseling are not acts of discrimination, but lawful precautions.”

*Jensen v. Delta Airlines, Inc.*, 2019 WL 922509 (6<sup>th</sup> Cir. 2019). Court rejected claims of airline pilot that he was unlawfully regarded as disabled based on his relapse into alcohol abuse. “Jensen could not show that the perceived characteristic (*i.e.*, that he had relapsed) was unrelated either to his ability to perform as a pilot or his qualifications for employment. [Last chance memo] required Jensen to abstain from any alcohol use as a condition of the Aftercare Contract under the program with Delta, the FAA and the ALPA.”

# ADA Challenges

## Marijuana

**Medical Marijuana** - 92% of states allow some use for medical treatment

- 33 states and DC have comprehensive laws
- 13 states allow for low THC, high cannabidiol products
- 18 states provide some form of employment protections for medical use
- Recreational use - 12 states and DC allow

### Drug Testing

- Is an employee under the influence at work?
- Current drug testing technology is lacking

# ADA Challenges

## Managing the disciplinary processes

- Separate performance issues from requests for accommodations or leave
- Evaluate closely to avoid claims of bias

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*Pennell v. Wake Med*, 2019 WL 4924457 (E.D.N.C. 2019). Claim by former employee that her employer violated the ADA by denying training and forcing her to resign after a threat of discharge, was dismissed because, among other reasons, the former employee didn't allege that she was meeting the hospital's legitimate expectations at the time she was discharged.

## Leave Laws

- Proliferation of paid family and medical leave laws at state and local levels
- Executive Order 13706 and U.S. Department of Labor Rule

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**States with paid leave laws:** Arizona, California, District of Columbia, Massachusetts, New Jersey and Washington

- Many municipalities
- 18 states introduced paid sick leave bills in 2019

### **Executive Order 13706 and U.S. Department of Labor Rule**

- Covers only certain federal government contractors
- Contracts entered after January 1, 2017

## FMLA - Updates

- DOL Opinion Letters
  - Use of intermittent leave for school conference regarding special education plan for child with disabilities
  - Must provide prompt designation notice; employer practice voluntarily extending FMLA leave beyond 12 weeks

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DOL Opinion Letter, August 8, 2019: Attending school conference to review special education plan for child with medical needs is a qualifying reason for FMLA leave. Employee had already been approved for intermittent leave for children's medical appointments.

DOL Opinion Letter, March 4, 2019: Employer must designate FMLA leave within 5 days of receiving notice of qualifying event for FMLA leave. Employer may not delay notice to allow employee to take more favorable leave first. Employer may not extend FMLA protections beyond 12 weeks, although employer may provide for leave on its own with similar protections.

DOL Opinion Letter, September 10, 2019: Same as March 4, 2019 opinion, with application where a more favorable leave is available under a collective bargaining agreement.

## FMLA - Updates

- Who is a health care provider for certification purposes?
- DOL is considering amending regulations

Is a licensed professional counselor a “health care provider” for purposes of the FMLA? *Belinda Martin v. Financial Asset Management*, No. 1:15-CV-0769-SCJ-JFK (N.D. Georgia, August 3, 2017), on appeal to the 11<sup>th</sup> Circuit. The court held that this counselor was not a “health care provider” under FMLA regulations. The FMLA defines a “health care provider” as “(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or (B) any other person determined by the Secretary to be capable of providing health care services.” [29 U.S.C. § 2611\(6\)](#). The regulations state that “[o]thers capable of providing health care services include only: (1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors ... (2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants ... [and] (4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits....” [29 C.F.R. § 825.125\(b\)](#).

## FMLA - Avoid common pitfalls

- Recognize trigger for employer-issued notice
- Pay attention to details of process - and overlap with ADA
- Consider in advance whether fitness for duty is required to return to work
- Separate disciplinary issues from FMLA leave (or requests for leave)

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*Employer failed to give required FMLA notice: Hannah P. v. Coats, \_\_\_ F.3d. \_\_\_, 2019 WL 664491 (4<sup>th</sup> Cir. Feb. 19, 2019), former employee's claim to proceed to jury trial.*

*Issue of fact about whether employer had decided on termination before employee requested FMLA leave: Samson v. Wells Fargo Bank, 2019 BL 241130 (9<sup>th</sup> Cir. June 28, 2019), court held case may proceed to jury trial.*

*Caplan v. Fluor Enterprises, No. H-17-2083 (S. D. Tex. April 8, 2019), employee allowed to proceed to trial on discrimination/interference claim when he was laid off on his first day back from FMLA. Employer gave conflicting reasons for employee's lay-off, resulting in an issue of fact for the jury to decide.*

*Phillips v. Great Dane, LLC, No. 4:18-CV-00401 (M.D. PA. June 12, 2-19), employee allowed to proceed to trial on discrimination/interference claim when his employment was terminated for smoking in non-smoking area shortly after he reported he would need FMLA leave for cancer treatment and when other employees smoking in same area were not disciplined.*

*DaPrato v. Massachusetts Water Resources Authority, 482 Mass. 375, Supreme Judicial Court of Massachusetts, June 5, 2019, court upheld jury verdict of \$2 million for employee whose employment was terminated following FMLA leave when the employer erroneously concluded that he misused leave for taking vacation during FMLA leave.*

# Questions?

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## When Work and Employee Health Intersect: Key Issues Under Federal and State Disability and Leave Laws



Rosemary Gill Kenyon

**EXPECT EXCELLENCE®**

# **Panel Discussion - Hot Topics in Employment Law**



**A Lie Can Travel Halfway Around  
the World, while the Truth is Still  
Putting on its Shoes**



## A Lie Can Travel Halfway Around the World, while the Truth Is Still Putting on its Shoes

Christopher G. Smith  
Clifton L. Brinson

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## From “whistleblower@gmail.com”

I am writing this because of my concerns about the activities of Mr. X. I have reason to believe that Mr. X has diverted somewhere around \$2 million of funds over the course of time, via expenses and payments to others. Also, there have been whispers of issues of domestic violence/hitting women.

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## Glassdoor: “CEO is Unhinged”

“The CEO treats staff like they are toys in the sandbox, making sweeping decisions about roles, goals, reporting structure, equity and bonuses on whims. This is a career damaging environment. . . . The board should remove the CEO.”

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## YouTube: "How to Tell If . . ."



OCT 14 2011 14:01:15

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## Response Options

- Do nothing
- Correct the misstatements
- Request removal of content
- Litigation

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## Do Nothing



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## Correct the Misstatements

“The remedy for speech that is false is speech that is true.” - Justice Anthony Kennedy

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## Litigation



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## Defamation Law - overview

- Defendant must have published a false statement, knowing it was false or failing to exercise due care
- Includes repetition of rumors
- Pure statements of opinion protected
- Law varies by state, and depending on whether public figures/issues involved

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## Defamation Law (cont.)

- Truth is an absolute defense
- Damages - potentially substantial
- One-year statute of limitations (NC law)

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## Finding the Culprit



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## Finding the Culprit (cont.)

FILED      IN THE GENERAL COURT OF JUSTICE  
 STATE OF NORTH CAROLINA      SUPERIOR COURT DIVISION  
 DURHAM COUNTY      CV5

\_\_\_\_\_ )  
 )  
 Plaintiffs,      )  
 )  
 v.      )  
 )  
 JOHN DOE or JANE DOE,      )  
 )  
 Defendant.      )  
 \_\_\_\_\_ )

(collectively "Plaintiffs"), complaining of Defendant John Doe or Jane Doe ("Defendant"),  
 allege and say as follows:

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## Finding the Culprit (cont.)



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Questions?

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**A Lie Can Travel Halfway Around the World, while the Truth Is Still Putting on its Shoes**

Christopher G. Smith  
Clifton L. Brinson

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**Mission Possible:  
Conducting Effective  
Workplace Investigations**



**Mission Possible:**  
 Conducting Effective Workplace Investigations

Sarah Wesley Fox

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**2018 EEOC ENFORCEMENT DATA**

“We cannot look back on last year without noting the significant impact of the #MeToo movement and the number of sexual harassment and retaliation charges filed.”

- Victoria A. Lipnic, EEOC Commissioner

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**2018 EEOC ENFORCEMENT DATA**

- Most frequent charge?  
Retaliation - 51.6%
- Second most frequent charge?  
Sex - 32.3%
- Sexual harassment charges up by what %?  
13.6 %

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REASONS TO CONDUCT AN INVESTIGATION

- Legal
- Employee complaint
- Hotline/anonymous complaint
- Customer, contractor or third-party complaint
- Public information
- Policy violations
- Safety concerns
- Workplace integrity
- Other

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OVERVIEW

- Core concepts
- Design and execution
- Pitfalls

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CORE CONCEPTS

- Design: Professional Integrity
  - To fully understand relevant facts/issues
  - To be impartial
  - To be respectful

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## CORE CONCEPTS

- Execution: Professional Integrity
  - Gain full understanding of relevant facts/issues
  - Impartial
  - Respectful

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## CORE CONCEPTS

- Result
  - Critical to workplace culture

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## SCOPE AND NATURE

- Concerns raised
- Policy/procedure involved
- All involved
- Information needed
- Obligations
- Expectations

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## SELECT THE RIGHT PERSON!

- Who
  - E.g., internal, external, GC, HR, board member, legal, consultant, thought leader
- Who
  - Team, support of other resources
- Factors
  - E.g., independence, credibility, objectivity, experience, soft skills, conflicts, specialty, timing, common sense, legal privilege/protection

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## DESIGN STRATEGY

- Who/how initiate contact with complainant
- Who/how initiate contact with accused
- Identify concerns to investigate
- Identify what should be communicated
- Identify potential interviewees

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## DESIGN STRATEGY

- Decide on the initial order of interviews
  - Complaining party first (not always)
  - Accused
  - Witness
  - Re-interview as needed
  - Ongoing evaluation of need for every witness and scope of inquiry
- Identify documents to review
- Plan timeline for investigation (sooner is better)
- Establish place of interviews

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## DESIGN STRATEGY

- Establish timing of interviews
- Establish file maintenance system
- Consider other needs
- Ongoing review and update of design strategy

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## GATHER RELEVANT DATA

- Statements/complaints
- Policies, procedures, handbook, postings etc.
- Business records
  - E.g., timecards, calendars, electronic communications, voicemails, messages, telephone use records, access to workplace records, computer use records, photographs, security videotapes

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## GATHER RELEVANT DATA

- Personnel file
- Exit interview
- Employee census
- Corporate chart
- Employee turnover data

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## GATHER RELEVANT DATA

- Communications and notes (e.g., employees, managers, HR, witnesses)
- Records of prior complaints involving complainant or accused
- Records of prior comparable complaints

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## POTENTIAL WITNESSES

- Complainant
- Accused
- Eyewitnesses
  - Persons identified by complainant
  - Persons identified by accused
- Supervisors

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## POTENTIAL WITNESSES

- Human resources
- Co-workers
- Author of significant documents
- Individuals reportedly subjected to similar activity
- Individuals who understand protocol
- Anonymous report

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## BE PREPARED

- Know your allegations, facts, people policies/practices, documents and timeline
- Ongoing list of allegations
- Detailed ongoing outline, including each employees' recollection
- Bring needed documents to interview in format for witness review

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## BE PREPARED

- Keep documents out of sight unless needed
- Keep separate witness files
- Anticipate and be prepared to respond to witness questions

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## KICKOFF

- Identify self and role
- Purpose of investigation, to extent needed
- If a company policy is involved, such as harassment or discrimination, stress importance of company policy
- Importance of honesty and full disclosure to integrity of results

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## KICKOFF

- Make no assumptions from questions asked
- Interview is only part of an ongoing investigation
- Decision will be made after all needed evidence gathered

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## KICKOFF

- Reassure witness that retaliation for participating in this or any investigation is absolutely prohibited
- Explain procedure for reporting any perceived retaliation
- Explain need for witness to report any concern of retaliation

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## KICKOFF

- Address confidentiality, if needed
- Start with general background of witness

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## INTERVIEW

- Listen - talk less
- Question format
  - Open ended (who, what, when, why, where and how)
  - Do not address adversarial or embarrassing issues at the start
  - Never indicate what you believe or express an opinion

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## INTERVIEW

- Proceed logically to issues (chronologically generally)
- Pin down facts
- Explore factual basis for conclusory statements

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## INTERVIEW

- Distinguish between personal knowledge and hearsay
- Getting to source of rumor may be fruitful

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## INTERVIEW

- Follow up answers with more questions to explore (validate or refute) other witness recollections
- Do not put words in the witness' mouth

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## INTERVIEW

- Ask witness to identify others who may have information and what they may know
- Ask if there is other information you should know
- Ask witness to provide documents they believe are important
- Encourage witness to contact you if they think of additional information, remember something new, or want to clarify anything

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## INTERVIEW

- If witness refuses to answer
  - Importance of cooperation
  - Opportunity to share information
  - Why
  - Explore alternatives
  - Investigation will proceed
  - Decision must be based on available information, including lack of cooperation

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## TOPICS TO AVOID IF UNRELATED TO INVESTIGATION

- Title VII, ADEA, ADA
  - E.g. medical information, partner status, religion, age

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## ASSESSING CREDIBILITY

- Proceed with caution
- Motive/interest in the matter
- Details
  - Grasp of facts
  - Inability to recall key or recent events
  - Recalls too much
  - Corroboration of less critical events
  - Shared stories and timelines
  - Internal consistency

EXPECT EXCELLENCE® 32

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## ASSESSING CREDIBILITY

- Difference between hearsay and personal knowledge
- Corroboration
  - External consistency
  - Others accounts, tangible evidence
- Admission against interest

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## ASSESSING CREDIBILITY

- Subjective
  - Evasive
  - Non-verbal clues
  - History of truthfulness
- Apply common sense

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## RECORD

- Handwritten or typed notes of investigator
- Transcribe summaries
- Handwritten statements by a witness (assess advisability)
- Audio or videotape (generally not advisable)
  - Hinders truth finding (if do so obtain consent, note date, time, place and individual, have witness confirm consent on the recording)

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## RECORD

- Court reporter transcript (assess advisability, note consent)
- New page/file for each interview
- Indicate date, location and who present
- Track questions asked and answers given

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## RECORD

- Record information as close to verbatim as possible
- Be factual
- Do not include interpretations or assumptions

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## RECORD

- Review and finalize notes promptly
- Verify legible
- No doodles or extraneous notes
- Dispose of working drafts, except for drafts of statements sent to third parties

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## REPORT FOR DECISIONMAKERS

- Is a report advisable
- May be used in subsequent litigation
- May be used to refresh memory
- Neutral, objective, thorough, precise and professional (e.g. no typos)

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REPORT FOR DECISIONMAKERS

- Airtight
- Complaint or circumstances that prompted the investigation
- Issues investigated

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REPORT FOR DECISIONMAKERS

- Key steps taken - interviews, documents reviewed, other actions
- Facts regarding each issue
- Address conflicting information

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REPORT FOR DECISIONMAKERS

- Identify factors which may contribute to conflict
- Summary of critical information
- The findings

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## REPORT FOR DECISIONMAKERS

- Recommendations, if in scope of investigator's role
- Do not include discussion with legal counsel
- Consider review by legal counsel

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## NEXT STEPS

- Investigator, management and counsel discuss facts, assure integrity and evaluate results
- Senior official should make needed employment decisions
- Decisionmakers should be fully briefed and have access to everything in the file

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## NEXT STEPS

- Determine Action Needed
  - Nature of problem, severity (e.g. verbal, physical, prior notice of offenses)
  - Complexity (e.g. number of people impacted, legal, public relations, culture)
  - Prior offenses
  - Mitigating factors (e.g. prior disciplinary records, receipt of policy, tenure)

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## NEXT STEPS

- Consistency
  - Adhere to guidelines and policy
  - Deviation can prompt claims from either side

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## NEXT STEPS

- Remedial actions
  - Discharge
  - Written warning or other discipline (e.g., demotion, pay decrease, bonus reduction or denial, suspension)
  - Counseling
  - Transfer (assess for retaliation claims)
  - Training

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## NEXT STEPS

- Communicate Result
  - Designate person(s) to communicate (consider witness)
  - Disclose on a need-to-know basis only
  - Personally advise the accused of result and corrective action, if needed
  - Document action taken

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## NEXT STEPS

- Personally advise the complainant of conclusion
- If good faith complaint, thank the complainant for raising concern
- Advise the complainant to report any reoccurrence or retaliation immediately
- If inconclusive, say “unable to determine,” do not say “no harassment occurred”

EXPECT EXCELLENCE® 49

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## NEXT STEPS

- Follow up
  - Contact the complainant periodically to ensure there is no reoccurrence or retaliation
  - Document follow up
- Consider redistributing applicable policy and stress importance of compliance
- Consider refresher training

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## DOCUMENTING THE INVESTIGATION

- Separate file
- Complaints
- List of actions taken and when
- Interview notes
- All documents considered

EXPECT EXCELLENCE® 51

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## DOCUMENTING THE INVESTIGATION

- Communications to and from witnesses
- Written statements
- All relevant documents - do not destroy any documents other than working drafts
- Keep “as is” documents with witness notes

EXPECT EXCELLENCE®

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## DOCUMENTING THE INVESTIGATION

- Tape recordings (if used)
- Final report, if one is prepared
- Documentation of results, remedial action and communications of same, if part of investigator’s role
- Preservation notices

EXPECT EXCELLENCE®

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## COMMON PITFALLS

- Failure to conduct an investigation
- Failure to conduct an appropriately thorough investigation
- Failure to address expectations
- Failure to conduct a timely investigation

EXPECT EXCELLENCE®

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## COMMON PITFALLS

- Failure to utilize an impartial investigator
- Failure to document appropriately
- Failure to take appropriate action
- Failure to maintain documentation
- Failure to follow-up about retaliation

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## Conclusion

- The #MeToo movement has had a significant impact on the rise of harassment and retaliation EEOC charges
- An effective investigation is a crucial tool
- Core concepts are key to effect investigation

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## Mission Possible:

Conducting Effective Workplace Investigations

Sarah Wesley Fox

EXPECT EXCELLENCE®

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# **OSHA Hot Topics and Trends: 2019 and Beyond**



## OSHA Hot Topics and Trends: 2019 and Beyond

Steve Parascandola

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### OVERVIEW

- Recent OSHA enforcement initiatives
- Top 10 Most Cited Violations
- Multi-Employer Liability
- Dealing with Whistleblowers
- Drug Testing

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### Federal OSHA Initiatives

- OSHA has been requesting additional inspectors since 2010
- OSHA has earmarked over \$100 million in extra funding for enforcement since 2011
- OSHA initiated its "Severe Violator Program," aimed at increasing the average penalty for serious violations (number of employers on SVEP list has now quadrupled since program inception)
- OSHA anticipated up to 5,000 unannounced inspections at "high risk" sites last year, focusing primarily on construction issues

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## Federal OSHA Initiatives

- Conducted over 32,000 federal inspections and almost 45,000 additional state partner inspections in FY2018
- Record number of significant and egregious enforcement cases
- Issued largest OSHA penalty ever (BP)
- Continued enforcement under Trump Administration
- But different method of calculating enforcement actions

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## What to Look for in 2020

- Continued “whistle-blowing” protections
- Enhanced and updated permissible exposure limits (including silica dust)
- Multi-Employer Citations
- Continued decrease in “Regulation by Shaming”
- Continued increase in compliance assistance

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## NC OSHA Inspections

- Approx. 3,000 inspections in FY2017 (up 3%, and 730 more than average state program)
- Typically, more than half of inspections are of construction and manufacturing workplaces
- 5,248 violations in FY2017 (10% increase over 2016)
- \$5,462,121 assessed in penalties (down 6% from FY2015, but up 78% from FY2009)

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## OSHA Most Cited Violations - FY2018

- Fall Protection
- Hazard Communication
- Wiring methods, components & equipment
- Lockout/Tagout (control of hazardous energy)
- Respiratory Protection

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## NC OSHA Inspections

- NC Industry Special Emphasis Programs:
  - Construction
  - Logging
  - Food Manufacturing
  - Wood products
  - Medical
  - Health hazards (silica, isocyanates, asbestos, hexavalent chromium, lead)

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## Multi-Employer Liability

Employers Liable: Those who control or create a worksite hazard

- “Creating Employer” (caused the hazard)
- “Exposing Employer” (exposed workers to the hazard)
- “Responsible Employer” (responsible for correcting the hazard)
- “Controlling Employer” (could have prevented the hazard)

EXPECT EXCELLENCE® 9

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## Multi-Employer Liability

Controlling Employers Must Exercise Reasonable Efforts to Detect and Abate Hazards

- “Reasonable” Hinges on Various Factors, Including:
- Supervisory Capacity;
- Knowledge or Expertise with respect to Violative Condition;
- Visibility and Duration of Hazard; and
- Subcontractor’s Safety History and Programs

EXPECT EXCELLENCE®

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## Common Pitfalls

- Hiring an Incompetent Contractor;
- Retaining Control of, or Performing, a Contractor’s Work; and
- Contractor Performs Inherently Dangerous Work Without Appropriate Safety Precautions

EXPECT EXCELLENCE®

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## Risk Management in Hiring Contractors

- Experience Modification Rate;
- Work History;
- Bonding Problems;
- OSHA Citations and Incident Rate;
- Safety Program (e.g., Confined Space, Trenching, Falls, Lockout/Tagout, etc.);
- Substance Abuse Program;
- Fleet Safety Program (e.g., for haulers); and
- Orientation and Training

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## Contract Language

Must Clearly Define:

- The Scope of the Contractor's Work;
- The Contractor's Duty to Comply with Federal, State, and Local Health and Safety Requirements, Including but not Limited to OSHA Standards, Building Codes and Local Ordinances; and
- The Contractor's Duty to Comply with all of the Employer's Requirements that are Beyond the Minimum OSHA Requirements

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## Post-Engagement of Contractor

- Select Competent Project Management
- Emphasize Job Safety
- Positively Reinforce Safe Contractor Behavior
- Negatively Reinforce Unsafe Contractor Behavior
- Other Methods of Minimizing Risks

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## Top 10 OSHA Citations for 2019

1. Fall Protection - General Requirements (1926.501)
2. Hazard Communication (1920.1200)
3. Scaffolding - General Requirements (1926.451)
4. Control of Hazardous Energy - Lockout/Tagout (1910.147)
5. Respiratory Protection (1910.134)

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## Top 10 OSHA Citations for 2019

6. Ladders (1926.1053)
7. Powered Industrial Trucks (1910.178)
8. Fall Protection - Training Requirements (1926.503)
9. Machine Guarding - General Requirement (1910.212)
10. Personal Protective and Lifesaving Equipment - Eye and Face Protection (1926.102)

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## Top 10 OSHA Citations for 2018

1. Fall Protection (1926.501)
2. Hazard Communication (1920.1200)
3. Scaffolding - General Requirements (1926.451)
4. Respiratory Protection (1910.134)
5. Control of Hazardous Energy - Lockout/Tagout (1910.147)

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## Top 10 OSHA Citations for 2018

6. Ladders (1926.1053)
7. Powered Industrial Trucks (1910.178)
8. Fall Protection - Training Requirements (1926.503)
9. Machine Guarding - General Requirement (1910.212)
10. Personal Protective and Lifesaving Equipment - Eye and Face Protection (1926.102)

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## Top 10 OSHA Citations for 2017

1. Fall Protection (1926.501)
2. Hazard Communication (1920.1200)
3. Scaffolding (1926.451)
4. Respiratory Protection (1910.134)
5. Control of Hazardous Energy - Lockout/Tagout (1910.147)

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## Top 10 OSHA Citations for 2017

6. Ladders (1926.1053)
7. Powered Industrial Trucks (1910.178)
8. Machine Guarding - General Requirement (1910.212)
9. Fall Protection - Training Requirements (1926.503)
10. Electrical - Wiring Methods (1910.305)

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## Dealing with Whistleblowers

- Whistleblowing on the Rise
- One of Largest Sources of OSHA Complaints and Inspections
- OSHA Handles Whistleblower Enforcement for over 20 Statutes

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- New Type of Whistleblower: No Longer Simply the “Disgruntled Employee”
- Different Reasons for this:
  - Greater Awareness of Protections against Retaliation
  - Financial Incentives

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### Tips for Avoiding Whistleblower Retaliation Claims

- Know the Laws and Don’t Break Them
- Adequately Communicate Regulations and Policies to Employees
- Ensure Employees Feel Empowered to Report Wrongdoing

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### Potential “Retaliatory” Measures:

- Discipline
- Suspension
- Demotion
- Reassignment
- Dismissal

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### Strategies for Dealing with Employees having Engaged in Protected Activity:

- Change Supervisor
- Ensure that All Involved Know:
  - Employee's Rights to Raise Concerns
  - Company No-Retaliation Policy
  - How to Manage the Conflict between Feeling Angry and Being Fair

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- Have HR Reach Out and Document Discussion
- Have Independent Source Investigate any Retaliation Allegation
- Document Performance Issues
- CAREFULLY CONSIDER any Potential Termination

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### Post-Accident Drug Testing Issues

- Main Concern: Employers Should Not Drug Test as a Retaliation Tool
- Most Drug Testing Policies are Fine
- Best to have Blanket Policies for All Employees
- Where Possible, Limit Testing to Those Actually Involved in Accident

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## On the Horizon for OSHA:

- The Carrot vs The Stick
  - Increased Outreach Approach
  - Agency to Consider Economic Impacts vs Safety
  - States Can and Will Approach Differently

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## NC OSHA Inspections

- Types of Inspections:
  - Imminent danger (11%)
  - Accident and fatality inspections (1%)
  - Inspections arising from employee complaints or referrals (29%)
  - General compliance or “programmed” inspections (44%)

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## Employer’s Rights if NC OSHA Knocks

- Right to request administrative warrant (**generally inadvisable**)
- Conditioning consent prohibited/No waivers
- Right to request that your attorney, representative or officer be present

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## Opening Conference

- NC OSHA credentials
- Explain nature and purpose of inspection
- Indicate scope of inspection and records to be reviewed
- Employer given copies of applicable standards and copy of employee complaints (name redacted if anonymity requested)

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## What Can NC OSHA Inspector Do?

- Take environmental samples
- Take photographs and videotape related to inspection's purpose
- Review OSHA-related records

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## What Can NC OSHA Inspector Do?

- Conduct interviews of owner, operator or employee
- Employer should never make unnecessary voluntary statement if accident investigation

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## Employer's Duties During NC OSHA Inspection

- Provide records/reports required by OSHA laws (e.g., OSHA 300 logs, accident reports to the N.C. Industrial Comm., HazCom materials, lock-out/tag-out documentation, postings, etc.)

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## Employer's Duties During NC OSHA Inspection

- No unreasonable restraint of NC OSHA regulators
- Make information available including necessary personnel or inspection aids

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## Employer's Rights

- Walkaround Right
  - Different employer and employee representative may accompany NC OSHA regulator during different inspection phases
  - Employer representative should know his/her role
  - Any employee may consult with NC OSHA regulator during workplace inspection

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## Employer's Rights

- Employer entitled to protection of trade secrets and other legally privileged communications
- Employer may identify workplace areas that contain/reveal trade secrets
- Personal employee information obtained is kept confidential by NC OSHA

EXPECT EXCELLENCE®

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## Employer's Rights

- No unreasonable disruption of workplace
- NC OSHA regulators must avoid duplicative efforts and obtain information with minimal burden upon employer

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## Closing Conference

- Employers should always request closing conference
- Informally discuss any alleged safety or health findings
- Employer should raise pertinent information/questions about bases for alleged findings
- Important time for proactive exchange
- Consideration given to legal counsel presence

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## Closing Conference

- Generally no discussion of proposed penalties, but will discuss right to appeal
- Receive copy of “Employer Rights and Responsibilities Following an OSHA Inspection” booklet

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## NC OSHA Investigation Records

- NC OSHA investigation records not subject to public disclosure while investigation or proceeding pending
- Obtaining witness’ statements post-investigation

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## Settlement Strategies

- Records, Records, Records.....
- Demeanor
- Facility History

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## Settlement Strategies

- Training
- Voluntary Audits
- Informal/Formal Conferences

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SMITH ANDERSON

## OSHA Hot Topics and Trends: 2019 and Beyond

Steve Parascandola

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# **Election Year Challenges for Employers**



## Election Year Challenges for Employers

J. Travis Hockaday

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### (Some) Election Year Hot Topics

- Impeachment probe
- Foreign policy / national security
- Immigration
- Gun control
- Equality
- Economy
- Climate change
- Religion
- Healthcare

EXPECT EXCELLENCE®

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### Adding Fuel to the Fire . . .

- Polarization
- Heightened rhetoric
- “Always on”/24 hour news cycle - where everything is “breaking news,” “bombshell,” “unprecedented”
- Social media
- Remote workplaces
- Blurred lines between work and life

EXPECT EXCELLENCE®

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## Consequences

- Productivity
- Civility
- Interpersonal relations
- Morale

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## Commingling of Religion and Politics at Work

- Political discussions, emails, jokes
- Evoke strong reaction based on religious beliefs
- Resulting in heated discussion about religion and politics, and/or comments implicating gender, race, national origin, etc.
- EEOC charge: hostile work environment and/or discrimination (“I was fired because I am *[insert protected class]*. I know my boss was biased because one day we were talking about Trump’s and *[other candidate’s]* stances on *[name issue]*, and she actually said, *[insert comment about protected class]*.”

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## “Religion” - What is it?

- Courts/EEOC - a belief is religious for Title VII purposes if it is religious in the person’s own scheme of things
- But, it is not social, political or economic philosophies, or mere personal preferences
- The problem - those philosophies and preferences often grow out of religious beliefs, and it is difficult to separate them

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Religion as Protected Class?

YES!

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Political Affiliation as Protected Class?

- It depends . . .
- No federal law makes political affiliation a protected class

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Political Affiliation as Protected Class?

- Not so fast:
  - Some state laws protect employees on basis of political affiliation (including, but not limited to, CA, NY, LA, DC, and some localities)
  - State lawful use/conduct laws could be construed to protect political activity outside of work
  - Discrimination or harassment based on political affiliation could be viewed as discrimination or harassment based on federally protected classes (religion, national origin, race, gender, etc.)

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## Employee Rights at Work - Religion

- Freedom from disparate treatment in recruiting, hiring, promoting, discipline, discharge, compensation or other terms, conditions and privileges of employment on the basis of religion
- Freedom from harassment based on religion
- Right to reasonable religious accommodations
- Problems arise when:
  - Employer imposes religious beliefs on employees
  - Employer accommodates one set of beliefs but not others

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## Employee Rights at Work - Religion

- Proselytizing generally permissible unless it:
  - interferes with employer's operations
  - impairs employer's relations with customers
  - creates a hostile/harassing work environment

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## Religion at Work - The Employer's Dilemma

- Employers must take prompt, remedial action in response to alleged religiously hostile work environment, while accommodating certain religious expression
- Employers must balance the rights of employees who want to express religious beliefs with the rights of others to be free from those beliefs

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### Employee Rights at Work - Politics

- Employee: “I have First Amendment rights, even at work!!!”
- Employer: “I can tell them they can’t bring that mess into this office.”
- Neither is completely correct.

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### First Amendment

- The truth - “**Congress** shall make no law . . . abridging the freedom of speech . . .”
- First Amendment does not provide for unabridged freedom of speech by employees in private workplaces
- First Amendment does not limit private employer’s right to regulate employee speech in the workplace
- But, as always, exceptions apply and, as a practical matter, outright bans are hard to enforce

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### Scenarios - what do you think?

- Devout Christian employee; keeps Bible open on desk at all times and quotes scriptures to co-workers; regularly tells co-workers to support only pro-life candidates.
- Employee routinely tells colleagues not to vote for Trump because of his age [OR] Warren because she’s a woman [OR] Buttigieg because he is gay [OR] Sanders because of his “bad heart.”

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## Section 7, National Labor Relations Act

- Applies in both union and non-union workplaces
- Guarantees employees the right to “engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”
- If political discussion/advocacy implicates workplace conditions/issues, employer restrictions on political speech may run afoul of NLRA

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## Scenarios - what do you think?

- Is either instruction permissible?
  - Do not talk about Democratic candidates or Trump.
  - Do not talk about Democratic candidates’ or Trump’s positions on minimum wage, gender pay equity, healthcare.

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## Campaigning at Work

- Generally, employers may prohibit having/displaying/distributing/wearing campaign materials and paraphernalia at work and soliciting campaign contributions, and using employer resources to do the same
- Employers may choose to allow, but remember:
  - Allowing political solicitation/distribution may open door to same by unions
  - Allowing for political purposes, but not union purposes, may result in unfair labor practice charge

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## Campaigning at Work

- Can employer prohibit these buttons?
  - Vote for Trump - Keep America Great!
  - Vote Elizabeth Warren - She'll Get Equal Pay for Us!  
[worn by group of women in workplace]
  - Join [union] in Voting for [whoever]!

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## Campaigning by Employer

- Employers may have PACs, but:
  - May not coerce employee contributions - they must be voluntary
  - May not reimburse employees for contributions

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## Voting - Federal Protections

- Federal crime to:
  - Intimidate, threaten, coerce or attempt to intimidate, threaten, coerce a person for the purpose of interfering with their right to vote for federal candidates of their choice. 18 U.S.C. § 594
  - Offer any expenditure to a person to cause them to vote for or against any federal candidate. 18 U.S.C. § 597

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## Voting - N.C. Protections

- Crime in N.C. to:
  - Discharge, threaten to discharge, or intimidate an employee or other individual on account of any vote such voter may cast, consider casting or intend to cast, or not cast, or which he may have failed to cast.

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## Voting Leave

- Not required under federal or N.C. law
- Well over half of states require employers to provide voting leave
  - Common provisions/issues: guaranteed or only if employee does not have sufficient time outside of work; paid/unpaid; restrictions on timing during workday; advance notice; posting requirements
- Some states require employers to allow employees to take leave to work at polls as election officials/ judges
- Multi-state employers should consider one-size-fits-all vs. state-specific policies

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## Practical Solutions

- Consider civility in the workplace or political activities policy to limit political discussions/promote respect in the workplace, with appropriate exceptions and carve-outs for NLRA/state law-protected activities
  - Do not use a blanket "no political activity" policy
  - Must be carefully crafted and narrowly tailored
- Consider prohibiting management (not protected by NLRA) from political discussions in the workplace
- Issue periodic reminders to all employees regarding discrimination, harassment and retaliation policies and reporting procedures, particularly as elections near
- Communicate with managers and supervisors
- Consider denying access to social media sites at work

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### Practical Solutions

- Ensure consistent enforcement of neutral policies regarding employee conduct
- Ensure consistent enforcement of rules regarding personal use of employer equipment (computers, printers, phones, supplies)
- Do not discourage political activities outside of work
- Check union contracts for protections for employee political activity
- PUBLIC EMPLOYERS - talk to your lawyer. The rules are different.




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### Thank You

#### Election Year Challenges for Employers

J. Travis Hockaday, Employment Law Update

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# EEO Update

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## EEO UPDATE

Zebulon D. Anderson

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This slide features the Smith Anderson logo in the top left, the title 'EEO UPDATE' in large teal letters, the name 'Zebulon D. Anderson' below it, and the 'EXPECT EXCELLENCE' slogan at the bottom. The right side of the slide has a decorative teal and red background with a circular pattern.

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## EEOC Developments

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This slide has a teal header with a decorative pattern and a dark teal footer with the company logo. The main content area is white with the title 'EEOC Developments' centered in teal.

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### Administrative Statistics

- Volume
  - FY 2017 = 76,418 charges
  - Fewest since 2006
  - Over last 10 years, retaliation and disability claims have increased the most
  - Retaliation has remained most common claim for nearly a decade - now 52% of all charges and continuing to ↑

EXPECT EXCELLENCE® 3 SMITH ANDERSON

This slide includes a large, faint 'SA' logo on the left. The text is in teal and black. The footer contains the company logo and slogan.

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## Administrative Statistics

- Location
  - FY 2018: 3,583 charges in NC - 4.7% of all charges nationwide
  - 8 States (Texas, Florida, California, Georgia, Illinois, Pennsylvania, New York, and North Carolina) account for 51.5% of all charges nationwide

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## Litigation Statistics

- In FY 2018 - 199 new merits lawsuits filed by EEOC
  - Most since 2011
  - Still, a lot less than 10-15 years ago
  - Finite resources focused on systemic litigation

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## Systemic Statistics

- Systemic cases involve 20+ employees and are focused on matters in which the alleged discrimination has a broad impact
- FY 2018
  - 409 systemic investigations resolved = \$30M
    - Substantial ↑ in volume from prior year
  - 204 systemic investigations yielded “cause” findings
    - While only 3% of all charges yielded “cause” findings, nearly 50% of the systemic investigations yield “cause” findings
  - 20% of all new lawsuits are systemic and 23% are multi-victim
  - EEOC has 91% success rate in systemic litigation

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## Harassment Statistics

- EEOC focus, and now we are in the #MeToo era
- Harassment alleged in 35% of all charges - highest ever
- 13.6% ↑ in sexual harassment charges
- Significant ↑ in cause findings involving harassment
- 50% ↑ in monetary recovery for charges involving harassment

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## EEOC Composition

- General Counsel
  - Sharon Gustafson confirmed in August 2019
- Five Commissioners
  - Janet Dhillon - R - confirmed in May 2019
    - From January - May, 2019, EEOC did not have enough Commissioners to do anything
    - Still have not done much beyond continued litigation efforts
  - Victoria Lipnic - R
  - Charlotte Burrows - D
    - Term expired July 2019
    - Confirmed for a new term in August 2019
  - Vacant
  - Vacant

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## Strategic Enforcement Plan: FY 2017-2021

1. Eliminating barriers in recruitment and hiring
  - Focus on class-based discriminatory practices (e.g., background checks, job application forms, medical questionnaires)
2. Protecting vulnerable workers, such as immigrant and migrant workers

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## 2017-21

3. Addressing selected emerging and developing issues

- Qualification standards and inflexible leave policies that discriminate against individuals with disabilities
- Duty to accommodate pregnancy-related limitations
- Protecting LGBT people from discrimination
- Protection for temporary workers, workers hired through staffing agencies, and misclassified "independent contractors"
- Protecting Muslims and people of Arab descent from backlash against them as a result of tragic events

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## 2017-21

4. Ensuring equal pay for all workers

5. Preserving access to legal system

- Broad releases
- Mandatory arbitration provisions
- The failure to maintain and retain required applicant and employment data
- Retaliation

6. Preventing Systemic Harassment

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## Sex Discrimination (Sexual Orientation and Gender Identity)

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## Background

- Title VII prohibits discrimination “because of . . . sex”
- For decades, the EEOC and courts agreed that Title VII *did not* prohibit discrimination because of sexual orientation or gender identity
- Beginning in 2012, the EEOC changed its position and concluded that Title VII does prohibit such discrimination
- Some courts have agreed with the EEOC, and some have disagreed

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## Appellate Courts in 2018

- *Zarda v. Altitude Express* (2<sup>nd</sup> Cir. 2018)
  - The Second Circuit concluded that Title VII prohibits discrimination because of sexual orientation
  - The Seventh Circuit had reached the same conclusion in 2017
- *Bostock v. Clayton County Bd Commissioners* (11<sup>th</sup> Cir. 2018)
  - The Eleventh Circuit reached the opposite decision
- *EEOC and Stephens v. R.G. & G.R. Harris Funeral Homes* (6<sup>th</sup> Cir. 2018)
  - The Sixth Circuit concluded that Title VII prohibits discrimination because of transgender or transitioning status

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## The Arguments

### A. Title VII prohibits sexual orientation and gender identity discrimination

1. **Definitional:** “Sexual orientation” necessarily requires the identification of the sex of a person and the sex of the persons to whom that person is attracted - therefore, sexual orientation discrimination is discrimination because of sex (*i.e.*, treating a female employee who has sex with a man differently than a male employee who has sex with a man is discrimination because of sex)
2. **Gender Stereotyping:** Courts agree that discrimination based on sex stereotypes violates Title VII - therefore, discriminating against individuals based on stereotypical views of sexual preference violates Title VII
3. **Associational Discrimination:** Courts agree that discrimination based on the race of someone with whom the employee associates violates Title VII - therefore, discrimination based on the sex of someone with whom the employee associates violates Title VII

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## The Arguments

- B. Title VII does not prohibit sexual orientation or gender identity discrimination
1. The “public meaning” of Title VII did not include a prohibition on sexual orientation discrimination
  2. “Sexual orientation” and “gender identity” are not on Title VII’s list of prohibited discrimination
  3. Congress did not intend to prohibit such discrimination when it passed Title VII in 1964
  4. This is an issue for Congress to decide, and past efforts to revise Title VII to prohibit such discrimination have failed

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## Supreme Court

- In April 2019, the Supreme Court decided to review *Zarda*, *Bostock*, and *Stephens*
- Briefing is complete
- Over 50 *amicus* briefs were filed
- While the EEOC advocates for a broad interpretation of Title VII, the United States has taken a contrary position
- Oral argument on October 8, 2019

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## Supreme Court

- The decision may say more about statutory interpretation than anything else
- Most people think Thomas and Alito will vote in favor of the employers
- Most people think Ginsburg, Breyer, Sotomayor, and Kagan will vote in favor of the employees
- That leaves Roberts, Gorsuch, and Kavanaugh - all appointed by Republican presidents
- At argument, Gorsuch asked the Solicitor General, “What is your response to the two-comparator problem we’ve been discussing and the fact that *at least one contributing cause appears to be sex*?”

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## Conclusion

- Be on the lookout for a major decision in Spring/Summer 2020 as we head toward election
- The decision likely will reveal a lot about how this Court believes statutes should be interpreted
- It also will evoke political reaction
- In any event, many states and counties prohibit sexual orientation and gender identify discrimination, and those laws will apply no matter what the Supreme Court decides
- So, the best practice remains to prohibit discrimination based on sexual orientation or gender identity

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## Sex Harassment

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## *Parker v. Reema Consulting Services (4<sup>th</sup> Cir. 2019)*

- Parker worked for Reema in its warehouse facility
- She was promoted several times between 2014-2016
- In March 2016, she was promoted to Assistant Operations Manager
- Two weeks later, she learned that male co-workers were spreading a false rumor about her
- They were saying that she got her promotion because she had a sexual relationship with Pickett, a higher ranking manager

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## Parker

- The rumor was started by Jennings, a male co-worker who wanted, but did not get, the promotion and who then reported to Parker
- Jennings spread the rumor because he was jealous
- Moppins, the highest ranking manager in the Warehouse participated in spreading the rumor
- As the rumor spread, Parker was treated with resentment and disrespect by co-workers
- When Parker and Pickett were late to a meeting in April, Moppins let Pickett into the meeting but slammed the door in Parker's face

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## Parker

- Parker met with Moppins about the situation, and Moppins blamed her for "bringing this situation to the workplace" and said that he could not recommend her for any more promotions
- In another meeting a few days later, Moppins screamed at Parker and said he should have fired her when she started "huffing and puffing about this BS rumor"
- Parker went to HR and complained of harassment by Moppins and Jennings
- Jennings then went to HR and complained about her
- HR told Parker to stay away from Jennings
- On May 18, the company fired Parker because of Jennings' complaint and because she was insubordinate to Moppins

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## Parker

- Parker sued, alleging that she was subjected to an unlawful hostile work environment and that she was fired in retaliation for her complaints of harassment
- The District Court dismissed her complaint
  - While the false rumors were "truly offensive" and went "right to the core of [her] merit as a human being," they were not made because of her sex - they were made because of jealousy and her alleged sexual conduct
  - Also, they were not sufficiently severe or pervasive
- Parker appealed

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## Parker

- The 4th Circuit reversed
- To state a Title VII claim for a hostile work environment because of sex, a plaintiff must allege workplace harassment that:
  - Was unwelcome
  - Was based on the employee's sex
  - Was sufficiently severe and pervasive to alter the conditions of employment and to create an abusive atmosphere
  - Was imputable to the employer

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## Parker

- The 4th Circuit rejected the District Court's conclusion that the harassment was not because of Parker's sex but rather was because of jealousy and alleged conduct
  - The Court concluded that a rumor that involved a sex-stereotype that "women, not men, use sex to achieve success" involved harassment because of sex
  - "[T]he dichotomy, that [the employer and the District Court] create between harassment based on gender and harassment 'based on conduct' is not meaningful in this case because the conduct is also alleged to be gender-based."

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## Parker

- The 4th Circuit also rejected the District Court's conclusion that the harassment was not sufficiently severe and pervasive
  - When making such a determination, a court "must 'look[ ] at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it [was] physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfere[d] with [the] employee's work performance.'"
  - Here, the Court concluded that the rumor was pervasive over several months, was spread by co-workers and managers, and resulted in abusive conduct by Moppins - that is enough to establish a claim

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### Menaker v. Hofstra (2<sup>nd</sup> Cir. 2019)

- January 2016 - Menaker was hired by Hofstra as head coach for men's and women's tennis teams
- Kaplan was a Freshman on the women's tennis team
- She met with Menaker to confirm that he would honor his predecessor's promise to increase her scholarship
- Menaker investigated and determined that there was no evidence of a promise

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### Menaker

- Kaplan explained that it was an oral promise
- Menaker said that he could not honor it for her Sophomore year, but could for Junior and Senior years
- She told her father
- In May 2016, her father called Menaker and threatened that if he did not honor the promise, "trouble would 'come back to him'"

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### Menaker

- In July 2016, Hofstra received a letter from Kaplan's lawyer
- The letter alleged that Menaker had sexually harassed Kaplan
  - He was "obsessed with" and commented on her menstrual cycle
  - He told her to dress nice and shave her legs
  - He screamed obscenities at women players
  - When she did not accept his advances, he threatened her scholarship and position on the team
  - He sent her creepy messages on social media

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## Menaker

- Hofstra GC and the AD met with Menaker
- They read the letter to him, and he denied the allegations
- The AD said he knew some of the allegations were untrue
- They told him they would investigate and report back to him

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## Menaker

- Hofstra had an anti-Harassment Policy that had detailed procedures
  - Required witness interviews
  - Accused had a right to submit a response
  - Investigator would produce a written determination at the close of the investigation

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## Menaker

- Menaker provided copies of his communications with Kaplan
- He suggested witnesses to be interviewed
  - Hofstra did not interview those witnesses
- Menaker got a lawyer, and Hofstra advised him to not take action against Kaplan
- In September, two months after receiving Kaplan's letter, Hofstra met with Menaker and fired him
  - He was given no advance warning or opportunity to prepare
  - He was not given the written investigation determination he had been promised
- Hofstra told him he was being fired for "unprofessional conduct"

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## Menaker

- Menaker sued, alleging the he was fired because of his sex
- The District Court dismissed his complaint
  - Menaker had failed to plead facts supporting a plausible inference that he was fired because he is a man
- Menaker appealed
- 2<sup>nd</sup> Circuit reversed

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## Menaker

- The sole issue was whether the allegations in Menaker's complaint provided support for an inference that he was fired because of his sex
- The Court concluded that he had satisfied that burden and focused on two reasons:
  - Procedural irregularities in the investigation raised an inference of sex discrimination
  - The University had previously been criticized for not adequately responding to women's complaints of sexual misconduct

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## Menaker

- According to the Court:
  - Where an employer (a) takes an adverse employment action against an employee, (b) in response to allegations of sexual misconduct, (c) following a clearly irregular investigative or adjudicative process, (d) amid criticism for acting inadequately to allegations of sexual misconduct by members of one sex, these circumstances support a *prima facie* case of sex discrimination
- Here, Hofstra argued that Menaker was fired for "unprofessional conduct" not harassment, so the harassment procedures did not apply
- The Court rejected that argument:
  - When contesting an inference of bias based on procedural irregularity, an employee cannot justify its abandonment of promised procedural protections by re-characterizing specific accusations in more general terms

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## Menaker

- The Court also concluded that, as an alternate theory, Hofstra could be liable for the discriminatory motivations of *Kaplan*
- While Kaplan's primary motivations may have been vindictive or financial, a secondary motivation may have been sex discrimination because she accused him of sexual misconduct
- So, if the person who made the allegation of sexual misconduct was motivated by sex discrimination and a desire that the accused be punished, the employer may be liable if it negligently punishes the accused

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## Ray v. International Paper (4<sup>th</sup> Cir. 2019)

- Ray was hired in 2002
- She reported to McDowell throughout her employment
- Beginning in 2003, McDowell harassed her:
  - Offered to pay her for sex
  - Stated that he wished he could "bend her over his desk"
  - Stated that he wanted to "father her baby"
  - Threatened to have sex with her sister-in-law if she did not have sex with him
  - Asked to see her "cootie," "cha-cha," and "monkey"
  - Grabbed her thigh

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## Ray

- In 2013, ten years after she said the harassment began, Ray reported McDowell's conduct to another supervisor, Owens
- Owens offered to "say something," but she said no
- IPC's harassment policy required Owens to report the harassment, but he didn't
- In 2014, McDowell learned that Ray had complained about him
- He confronted her, and she denied it
- McDowell told her that she no longer could work voluntary overtime

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## Ray

- In September 2014, Ray reported everything to HR for the first time
- HR conducted an investigation, corroborated *some* of Ray's allegations, and concluded that McDowell was lying when he denied her allegations
- But, they did not discipline McDowell because there were no eye-witnesses to the conduct
  - They did tell McDowell not to communicate with Ray

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## Ray

- In November 2014 and June 2015, Ray complained that McDowell was staring at her
- HR investigated, and co-workers confirmed that McDowell was staring at Ray, picking on Ray, and making her job more difficult
- They did not discipline McDowell, but did tell him to stop
- Ray sued for hostile work environment sexual harassment and retaliation
- The District Court dismissed her complaint

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## Ray

- Ray appealed, and the 4th Circuit reversed
- When a supervisor harasses an employee and the harassment culminates in "tangible action," the employer is "strictly liable" for the conduct
  - That means there is no defense
- To establish this sort of claim, an employee must show:
  - A tangible action that constituted a significant change in employment status (*i.e.*, termination, failure to promote, decrease in pay, etc.)
  - Some nexus between the harassment and the tangible action

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## Ray

- Contrary to the District Court, the 4th Circuit concluded that taking away a right to voluntary overtime was a tangible action
- And, also contrary to the District Court, the 4th Circuit concluded that when the harasser makes the decision to take the tangible action, a nexus easily is established

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## Ray

- With regard to the retaliation claim, the 4th Circuit noted that the employee had to show:
  - Protected activity;
  - Adverse action; and
  - A causal connection
- Contrary to the District Court, the 4th Circuit concluded that:
  - Prohibiting voluntary overtime was an adverse action
  - Even though she first complained about harassment in 2013, she continued to complain through 2014 near the time the adverse action happened, which establishes evidence of a causal connection

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## Conclusions

- Sexual Harassment is an EEOC focus area
- In this #MeToo era, courts are beginning to give expansive interpretation to sexual harassment laws
  - Gossip and rumor can constitute harassment
  - Not allowing overtime can be a tangible and adverse action
  - People who are disciplined as a result of harassment investigations may have discrimination claims
- If HR hears of rumors and gossip about employee sex activities, it needs to investigate and take steps to stop them
- Train managers to take steps to try to prevent such gossip
- When supervisors are involved in the alleged harassment, the stakes are the highest

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## Conclusions

- Adopting anti-harassment policies is necessary, but so is strictly following those policies
  - So make sure you are prepared to take the investigative steps that are described in the policy
- Conducting prompt and thorough investigations is essential, but be wary of potential claims by the accused, not just the accuser
- Be careful when communicating with accused and accuser - don't forecast investigation results before it is complete
- Be balanced and thoughtful - don't simply fire all people accused
- Likewise, don't fail to take action when it seems appropriate
- Conduct a thorough and balanced action, consider credibility, and implement thoughtful appropriate action

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## Age Discrimination

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## *Westmoreland v. TWC Administration (4<sup>th</sup> Cir. 2019)*

- Westmoreland was hired in 1985
- She held various positions over the next 30 years
- Her performance was generally good, with only two minor infractions before July 2015
- In 2013, Westmoreland's supervisor changed from Carroway to Busgith
- Her responsibilities changed too
  - More supervisory duties and increased documentation expectations

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## Westmoreland

- She struggled with the new responsibilities
- But, her "overall" performance remained satisfactory
  - 2014 Annual Review - some concerns noted, but overall rated "successfully meets expectations" and got a raise
- On July 21, 2015, she met one-on-one with a subordinate, Sherrill
- On July 27, 2015, they met again, and Westmoreland prepared a form to document their meeting
- When Sherrill dated her signature for July 27, Westmoreland whited it out and directed Sherrill to write in July 21
- Westmoreland then submitted the altered form to Busgith

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## Westmoreland

- A few days later, Busgith met with employees who reported to Westmoreland, and Sherrill reported that Westmoreland had directed her to change her signature date on the form
- Busgith reported the issue to Newcomb in HR who then investigated
- Westmoreland admitted the conduct, but explained that she believed the correct date was the date the meeting started, not when it concluded
- Busgith told her not to worry and that this would involve nothing more than a "slap on the wrist"
- Newcomb reported the results of her investigation to Knotts, her boss

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## Westmoreland

- On August 14, Westmoreland's former supervisor, Carroway, came to her office
- Newcomb joined by phone
- Carroway explained that Westmoreland was being fired for making false statements, which violated company policy
- Busgith initiated the decision; Knotts approved it; Newcomb drafted the termination paperwork; and Carroway delivered the message
- While walking Westmoreland out to her car after the termination, Carroway said "Oh, girl, you don't have nothing to worry about. You'll get another job. Just go home and take care of those grandbabies."

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## Westmoreland

- Westmoreland was 61
- Sherrill was 43 and was not disciplined
- Westmoreland was replaced by someone who was 37
- Westmoreland sued, alleging age and race discrimination
- At trial, the Court dismissed the race claim, and the Court declared a mistrial on the age claim
- Upon re-trial, the jury awarded her \$350K for age discrimination
- TWC appealed

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## Westmoreland

- TWC's primary argument was that there was insufficient evidence of age discrimination to support the claim
- The 4<sup>th</sup> Circuit rejected this argument 2-1
- The Court pointed to the following evidence:
  - Westmoreland was 61
  - Her replacement was 37
  - The people involved knew she was over 40
  - Carroway (who delivered the news) made a "condescending and age-related remark" immediately after the termination
  - TWC could have taken a less serious adverse action
  - Busgith had told her not to worry
  - She had worked for the company for 30 years with no significant discipline

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## Westmoreland

- According to the majority, that was sufficient evidence of age discrimination
- The Court put a lot of weight on the statement of Carroway, stating that there was sufficient evidence for the jury to conclude that she was a decision maker (even though evidence showed she simply delivered the news) "who harbored age-based animus based on her 'grandbabies' comment"

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## Westmoreland

- According to the dissent, “[t]here is absolutely no evidence that Glenda Westmoreland was fired because of her age.”
- The dissent argued that Carroway wasn’t a decision maker and, in any event, the alleged statement was ambiguous and not suggestive of age-based animus
- Then, the dissent stated “Absent Carroway’s statement, Westmoreland only proved that she was 60 years old and was replaced by someone 37 years old. If that is all that is required, virtually every person over 40 will have an age discrimination claim when fired for a reason the jury considers unfair. . . . Congress would croak to learn the [ADEA] would entitle an employee to recover in the circumstances of this case. I too croak, in harmony.”

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## Conclusions

- The 4<sup>th</sup> Circuit has changed, and it is not reliably employer-friendly
- Candid feedback in reviews is essential
  - Be wary of “overall” assessments - did overall performance really “meet expectations”?
  - Was a raise really warranted?
- Terminating long-term employees is perilous
- Firing an employee for a reason that seems harsh or unfair shouldn’t be a violation of law - but, as this case shows, it may not be a good idea
- Managers and HR have to be very careful about what they say
  - Don’t say anything age-related
  - Don’t predict the outcome of the investigation before it is complete

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## Disability Discrimination

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## EEOC v. McLeod Health (4<sup>th</sup> Cir. 2019)

- Whitten worked for McLeod for 28 years
- She was the editor of the internal employee newsletter
- One aspect of that job involved interviewing employees and writing about company events
- McLeod had five separate business locations, which were spread over 100 miles
- Accordingly, Whitten typically traveled from location to location to interview employees

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## McLeod Health

- Whitten was born with “postaxial hypoplasia of the lower extremity,” meaning that she was missing certain bones in her legs, feet, and right hand
- This caused her mobility problems throughout her life, and she sometimes fell
- Despite this condition, she performed her job for nearly 30 years with acceptable performance
- McLeod admitted that her condition had “not impacted her ability to perform the essential functions of her job”

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## McLeod Health

- At some point, Whitten's manager, Swindler, informed HR that she had concerns about Whitten's performance:
  - Deadlines missed
  - Arrived late
  - Less than enthusiastic attitude
  - Looked sluggish and walking seemed harder than usual
- Swindler wondered if Whitten was having health issues that were impacting performance
- At HR direction, Swindler met with Whitten and discussed performance issues
  - Her health was not discussed

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## McLeod Health

- Over the next four months, Whitten fell three times, only one of which was at work
  - She was not seriously injured when she fell
- Swindler found out about the falls and reported them to HR
- HR told Swindler to speak with the Occupational Health department, and she did
- Occupational Health listened to Swindler's report, reviewed the job description, and reviewed medical records on file. It decided to require Whitten to take a Fitness For Duty exam
- It required the FFD exam to make sure Whitten safely could travel from location to location

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## McLeod Health

- After conducting the FFD exam, the nurse practitioner decided to refer Whitten for a more comprehensive Functional Capacity exam
- Whitten was placed on paid leave
- Occupational Therapist Laliberte concluded that Whitten was a "high fall risk" in "75% of all work related task[s]"
- He recommended work restrictions:
  - Travel no more than 10 miles
  - Use assisted devices when moving
  - Use a parking space in an area with no curb
- While Whitten did not think she needed all this help, she requested the suggested accommodations

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## McLeod Health

- After reviewing Laliberte's recommendations and Whitten's request, McLeod told her that she could not return to her job because the accommodations would prevent her from going from facility-to-facility to interview witnesses, which was an essential part of her job
- So, McLeod placed her on unpaid leave and asked to her consider other positions with the company or to submit additional information showing that she could safely travel
- After 6 months on unpaid leave, McLeod terminated her employment

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## McLeod Health

- EEOC sued on behalf of Whitten
  - Alleged that the medical exam was illegal
  - Alleged that she was fired because of her disability
- The District Court granted summary judgment to McLeod
- EEOC appealed

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## McLeod Health

- ADA prohibits employers from requiring a medical exam “unless such examination . . . is shown to be job-related and consistent with business necessity”
- To satisfy that standard, an employer must “reasonably believe,” based on “objective evidence,” that either:
  - The employee’s ability to perform an essential job function is impaired by a medical condition
  - Performing the essential functions of the job poses a “direct threat” to the employee or co-workers

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## McLeod Health

- McLeod argued that it reasonably believed that Whitten could not travel from location-to-location without posing a direct threat to herself
- The 4<sup>th</sup> Circuit, however, concluded that the threshold issue was whether traveling between locations was an essential function of the job
  - The job description did not contain a travel requirement
  - Whitten testified that while she preferred to interview employees in person, it was not essential
  - Evidence suggested she could have conducted employee interviews by phone
- Accordingly, the 4<sup>th</sup> Circuit concluded that a jury had to decide whether traveling to various work locations was an essential function of Whitten’s job

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## McLeod Health

- Furthermore, the Court concluded that even if travel was an essential function, it was not clear that the medical exam was lawful
- Requiring such a medical exam must be based on a "reasonable belief" that is informed by "objective evidence"
- When McLeod made the decision to require the exam, the facts showed:
  - She had been doing the job successfully for almost 30 years
  - Two of the most recent falls were not at work, and none caused serious injury
  - Her supervisor thought she looked sluggish
  - She had missed some deadlines and was late on some occasions
- According to the 4<sup>th</sup> Circuit, based on these facts, a jury could conclude the McLeod did not have a reasonable belief that Whitten could not perform the job without posing a direct threat to herself

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## McLeod Health

- Finally, the District Court granted summary judgment on the termination claim because it believed that EEOC could not show that Whitten could perform the essential functions of the job
- The 4<sup>th</sup> Circuit reversed that decision for the same reasons - the evidence created a jury question about what were the essential functions of this job

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## Conclusions

- Beware the long-term employee
- Beware of requiring medical exams
- Don't ignore common sense - a conclusion that someone who has been successfully doing a job for a long time suddenly can't do it naturally deserves suspicion
- Regularly review and update job descriptions
- Address performance in reviews and avoid hypothesizing about the reasons for the performance
- Don't hire Laliberte as your Occupational Therapist
  - When asked how he concluded that she was a high fall risk in 75% of her work tasks, he explained: "[S]he's fallen at home. [She's] fallen at restaurants, and [she's] fallen at work. One, two, three. 75 percent."

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**Race Discrimination**

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**Haynes v. Waste Connections, Inc. (4th Cir. 2019)**

- Haynes (AA) began working for WCI in 2006
- He drove a large “front-end loader” that collected trash from WCI customers
- On October 6, 2015, he reported to work at midnight, 2 hours before he was scheduled to work
- He reported early because he hoped to leave early
- WCI mechanics, however, explained that his truck was down for repairs, though they could soon get another one ready
- Haynes alleged that his stomach began to bother him, so he left 45 minutes before he was scheduled to start work

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**Haynes**

- Haynes sent a text to his supervisor, Fountain (white), stating that he had a stomach virus and could not work
- Fountain did not see the text until around 3:30 AM, well after Haynes’ scheduled start time
- Fountain scrambled to get coverage, but about ¼ of the customers Haynes was supposed to visit did not receive their scheduled service
- Fountain spoke with the mechanics who told him that Haynes had been angry when his regular truck wasn’t ready and said, “F\*\*\* this.”

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## Haynes

- Fountain met with his supervisor and HR
- They decided to terminate Haynes' employment
- They contacted Haynes and told him that he was being fired for "job abandonment"
- Haynes sued alleging race discrimination

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## Haynes

- During the litigation, WCI offered expanded reasons for the termination of Haynes' employment
- WCI explained that three earlier incidents that year also were factors in the termination decision
  - In June, WCI claimed Haynes drove away without removing a fuel pump. Haynes did not recall this incident
  - In August, WCI claimed Haynes undershot a driveway, thereby getting his truck stuck. Haynes claims the weather was bad.
  - Later that month, WCI claimed that its electronic Drive Cam System recorded Haynes with one hand on the steering wheel and one on a phone. Haynes said that he was stopped
- After these incidents, Haynes asked whether his annual review would be bad, and Fountain told him "everything looks good" and he has "nothing to worry about"

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## Haynes

- After considering the evidence, the District Court granted WCI's motion for summary judgment
- It concluded that Haynes had failed to establish a *prima facie* case of discrimination because he had failed to establish that a similarly situated white employee was treated better
- It further concluded that even if he had established a *prima facie* case, he had failed to establish that the termination reason offered by WCI was a pretext for discrimination
- Haynes appealed

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## Haynes

- The 4<sup>th</sup> Circuit reversed
- When trying to establish a *prima facie* case of discrimination with comparator employee evidence, a plaintiff must offer evidence that the plaintiff and the comparator “dealt with the same supervisor, [were] subject to the same standards and . . . engaged in the same conduct”
- Haynes offered evidence that a white employee, Hicks, held the same job, was supervised by Fountain, engaged in similar conduct, but was not fired
- Specifically, Haynes offered evidence that Hicks:
  - Was twice disciplined for using a phone while driving
  - Was disciplined for driving while distracted
  - Was disciplined for responding too late to a traffic situation
  - Yelled at Fountain before quitting, but then was allowed to return to employment
- According to the 4<sup>th</sup> Circuit the alleged conduct of Haynes and Hicks was sufficiently similar to raise an inference of race discrimination when they were treated differently

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## Haynes

- WCI also argued on appeal that Haynes could not establish a *prima facie* case because he could not establish that he was performing his job at a satisfactory level
- The 4<sup>th</sup> Circuit disagreed:
  - Fountain told Haynes that “everything looks good” and there was “nothing to worry about”
  - Haynes got a raise shortly before the termination
  - This is evidence of satisfactory performance

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## Haynes

- The 4<sup>th</sup> Circuit also rejected WCI's argument that Haynes had failed to establish that the termination reasons upon which WCI relied were a pretext for discrimination
- The Court ruled that it “allowed an inference of pretext in cases where an employer has made substantial changes to its proffered reason for discharge over time”
  - At termination, Haynes was told he was fired for job “abandonment”
  - Now WCI relies also on three other incidents and Haynes' alleged “poor attitude”
  - The unemployment records state that Haynes was discharged for “absenteeism” and, while those were the words of the government agency and not WCI, WCI did not correct them
  - The final termination paperwork indicated he was discharged for “violation of rules”
  - And, under WCI policies, job “abandonment” requires 3 days of no call/no show, which was not present here

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## Conclusions

- When analyzing a proposed adverse action, be thoughtful (and over inclusive) when assessing whether a similarly situated person outside the protected class has been treated better
- Be very careful and consistent when articulating termination reasons
  - Don't provide a single reason when there were multiple variables
  - Don't provide a reason that is inconsistent with policies
  - Don't provide inconsistent reasons verbally, on termination forms, on unemployment forms, or elsewhere
- Train supervisors to be very careful when assessing performance, whether the assessment is verbal or written

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## SCOTUS

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## SCOTUS

- Not many interesting Supreme Court cases
- 3 arbitration decisions demonstrate that the Court is committed to developing the law surrounding the resolution of disputes via arbitration

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Fort Bend County, Texas v. Davis (2019)

- Before a party may file a lawsuit asserting a Title VII discrimination or retaliation claim, a party must first file a charge of discrimination with EEOC
- If a party files a lawsuit without first filing a charge, does the Court lack jurisdiction altogether, or does the Defendant simply have a defense?
- The Court ruled that the charge filing requirement is not “jurisdictional,” meaning that a defendant must timely assert the defense or lose it

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EEO UPDATE

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