

THE LAW OFFICES OF

ESTD 1977  
**G K H**

**GIBBEL KRAYBILL & HESS** <sup>LLP</sup>

ATTORNEYS & COUNSELORS AT LAW

# 2018 Employment Law Seminar

Presented by GKH Attorneys  
**Jeffrey J. Worley, Justin J. Bollinger and  
Lindsay J. O'Neil**  
May 10, 2018

Gibbel Kraybill & Hess LLP (“GKH”) prepared these materials for informational purposes only. As each situation is unique, these materials are not intended to be relied upon for specific legal decisions, and the dissemination of this information has not established an attorney-client relationship between GKH and any recipient. Please contact an attorney at GKH to discuss specific situations.

# The Affordable Care Act

- Employer Mandate remains in full effect
- Reporting requirements remain in full effect



# Immigration

- 10,000 Immigration and Customs Enforcement (ICE) agents expected to be hired
- Increased fines for violations for noncompliance
- Internal Audit of I-9s

# Wage and Hour

- Department of Labor's PAID Program
  - Payroll Audit Independent Determination
- Independent Employer Driven
- Avoid litigation
- Avoid liquidated damages

# Sexual Orientation

- Courts continue to grapple with whether sexual orientation is a protected class under the “sex” category of Title VII
- Last year
  - Circuit split, as no ruling by the U.S. Supreme Court
  - 3d Circuit: no recent decision; still operating under 2001 case; not protected class

# Sexual Orientation

## Current state of affairs

- Still no decision from the U.S. Supreme Court
- Still a Circuit split
  - 2d Circuit in *Zalda v. Altitude Express* (Feb. 2018)  
YES, sexual orientation is protected

# Sexual Orientation

- 3d Circuit: still no recent ruling; still not a protected class
- Pennsylvania Federal District Courts have examined
  - o June 2017: *Coleman v. AmeriHealth Caritas* (E.D. Pa.): NO, not protected
  - o September 2017: *EEOC v. Scott Medical Health Ctr.* (W.D. Pa.): YES, protected



# Personnel Files

- Pennsylvania Personnel Files Act creates a right for employees to inspect certain contents of their personnel file
- What about former employees?

# Personnel Files

- PA Dept. of Labor - former employees to inspect up to 30 days post employment
- *Thomas Jefferson University Hospitals, Inc. v. PA Dept. of Labor and Industry* (Pa. 2017)
  - Pa Supreme Court held that former employees are not “employees” under the Act and, therefore, have no right to inspect

# Paid Family Time Leave

*EEOC v. Estee Lauder* (E.D. Pa.)

- In 2013, Estee Lauder adopted a paid family leave policy that affords new mothers pregnancy disability leave *plus* 6 weeks of “bonding” leave *plus* flexible scheduling upon return to work
- New fathers afforded only 2 weeks of bonding leave and no flexible scheduling

*Is this a problem?*

# Paid Family Time Leave

- Case is still pending, so no decision yet
- Problem: While language of Estee Lauder's family leave policy uses terms of "primary caregiver" versus "secondary caregiver," in practice, it ends up being woman versus man

# ADA and FMLA

Consider this:

- Employee takes 12 weeks of FMLA for severe back pain. Shortly before his leave expires, he contacts his employer to inform it that he's having back surgery on his last day of FMLA and needs an additional 2-3 months of leave for recovery

*Does the employer have to give the additional time as an accommodation under the ADA?*

# ADA and FMLA

*Severson v. Heartland Woodcraft, Inc.* (7<sup>th</sup> Cir. Sept. 2017)

- No! The Court unequivocally said “a long term leave of absence cannot be a reasonable accommodation,” because it is “not a means to perform the job’s essential functions.”
- Employee who can’t work, *i.e.*, perform his or her job’s essential functions, is not a “qualified individual” under the ADA
- Early April 2018 - U.S. Supreme Court denied cert

# ADA and FMLA

But note the EEOC guidelines:

“An employer must consider providing unpaid leave to an employee with a qualifying disability when the employee requires it, and so long as it does not present an undue hardship for the employer.”

# Religious Discrimination

Consider this:

- An employer implements a mandatory policy of fingerprinted all its employees in order to obtain background checks
- An employee refuses to undergo fingerprinting stating it violates her sincerely held religious belief that fingerprinting is akin to the mark of the beast, and she may risk not going to Heaven if she gets the fingerprinting

*Must the employer accommodate this request?*



# Religious Discrimination

- *Bonnie F. Kaite v. Altoona Student Transportation Inc.*  
(W.D. Pa. 2017)
- Maybe
- The Employer sought to have the case dismissed at the outset of the case
- The Court said no, it wouldn't dismiss at the outset, but didn't address case's merits
- The case settled at mediation in February 2018

# Religious Discrimination

Compare with *EEOC v. Consol Energy Inc.* (4<sup>th</sup> Cir. 2017)

- Mining worker with employer for 37 years when it began requiring employees to use a newly installed biometric hand scanner to track time and attendance
- Miner refused to use the scanner because he stated it threatened his core religious commitments, as the scanner was akin to the mark of the beast
- Company permitted 2 employees with hand injuries, who couldn't be enrolled with a scanner on either hand, to manually enter a number via a keypad
- Company's failure to accommodate violated his rights
- 4<sup>th</sup> Circuit upheld a \$586,861 award to the miner for religious discrimination / failure to accommodate

# National Labor Relations Act

Employees have a right “...to engage in... concerted activities for the purpose of collective bargaining or other mutual aid and protection.”

What does that entail? Compensation, hours, working conditions, supervisors, and workplace policies

# Employee Speech

Employees have an absolute right to speak about:

- Discrimination
- Harassment
- Request a disability accommodation
- Request time off for Family Medical Leave

# Civility in the Workplace

Employers can once again include policies that require employees to foster “harmonious interactions and relationships” or “rules requiring employees to abide by basic standards of civility.”

# First Amendment

U.S. Const. amend. I (1791)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

# Governmental Action?

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

JULI BRISKMAN  
47393 River Crest Street  
Sterling, Virginia 20165

Plaintiff,

v.

AKIMA, LLC  
13873 Park Center Road; Suite 400N  
Herndon, VA 20171

Serve:  
CT Corporation System  
4701 Cox Road, Suite 285  
Glen Allen, VA 23060

Defendant.

Case No. **2018 5335**

FILED  
CIVIL INTAKE  
2018 APR -4 PM 2:09  
JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

COMPLAINT

COMES NOW Plaintiff, JULI BRISKMAN, and brings this action against Defendant, AKIMA, LLC ("Defendant"). In support thereof, Plaintiff states as follows:

# Harassment in the Workplace



# Employer's Legal Obligation

- Have a practice and a policy of no harassment
- Have a complaint structure
- Promptly and thoroughly investigate any complaint of harassment
- Take appropriate disciplinary action against anyone guilty of harassment

## *Faragher/Ellerth Defense*

Employer can avoid liability for a hostile work environment created by a supervisor if it can demonstrate: (1) it took reasonable steps to prevent and promptly correct sexual harassment in the workplace, **and** (2) the aggrieved employee unreasonably failed to take advantage of the employer's preventive or corrective measures.

# EEOC Guidance to Prevent Harassment

## Five Core Principles:

- Committed and engaged leadership
- Consistent and demonstrated accountability
- Strong and comprehensive harassment policies
- Trusted and accessible complaint procedures
- Regular, interactive training tailored to the audience and organization

# Committed and Engaged Leadership

Corporate leadership that make the elimination of workplace harassment a priority

- Not only addressing elimination of outright actionable harassment, but also elimination of low level offenses, i.e. subtle innuendos
- Creating a corporate culture of inclusion

# Committed and Engaged Leadership

- Conducting anonymous employee surveys on a regular basis to assess whether harassment is occurring, or is perceived to be tolerated; and
- Partnering with researchers to evaluate the organization's harassment prevention strategies.

# Consistent and Demonstrated Accountability

- Effective training
- Impose discipline that is prompt, consistent, and proportionate to the severity of the harassment, when harassment is determined to have occurred

# Consistent and Demonstrated Accountability

- Note: Zero tolerance policy is disfavored
- Each occurrence must be evaluated on the level of severity and the circumstance
- Zero tolerance often results in a failure to report low level violations

# Strong and Comprehensive Harassment Policies

- An unequivocal statement that harassment based on any legally protected characteristic is prohibited and will not be tolerated
- An easy-to-understand description of prohibited conduct, including examples
- Communication of reporting system and encouragement to report harassment



# Strong and Comprehensive Harassment Policies

- Ensure that the policies are communicated to employees in an easily understood style and format
- Review and update handbook and policies as needed

# Trusted and Accessible Complaint Procedures

An effective harassment complaint system welcomes questions, concerns, and complaints; encourages employees to report potentially problematic conduct early; treats alleged victims, complainants, witnesses, alleged harassers, and others with respect; operates promptly, thoroughly, and impartially; and imposes appropriate consequences for harassment or related misconduct, such as retaliation.

# Trusted and Accessible Complaint Procedures

- The creation of effective and well-understood complaint mechanisms
- A process for investigating and resolving harassment complaints
- Provides multiple avenues of complaint
- Provides to the greatest extent possible confidentiality as to reporter and witnesses

# Trusted and Accessible Complaint Procedures

- Ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for alleged harassment
- Includes process to convey resolution of the complaint to the complainant and alleged harasser

# Trusted and Accessible Complaint Procedures

- Employees responsible for receiving complaints should be trained with respect to receiving, investigating and resolving complaints
- Have authority to investigate and take appropriate action
- Take all complaints seriously

# Regular, Interactive Training

- Regular anti-harassment training to all employees
- Education on rules, policies, procedures and consequences
- Harassment training is most effective when it is tailored to the organization and audience. Accordingly, when developing training, the daily experiences and unique characteristics of the work, workforce, and workplace are important considerations

# Regular, Interactive Training

- Descriptions of unlawful harassment and conduct that, if left unchecked, might rise to the level of unlawful harassment;
- Examples that are tailored to the specific workplace and workforce;
- Information about employees' rights and responsibilities if they experience, observe, or otherwise become aware of conduct that they believe may be prohibited;
- Explanations of the complaint process; and
- Explanations of the range of possible consequences for engaging in prohibited conduct.

# Regular, Interactive Training

- Specific training for supervisors and managers
- Information about how to prevent, identify, stop, report, and correct harassment



# Harassment Policy

## Prohibition:

All team members should be able to work in an environment free from harassment by team members or other individuals. It is the employer's policy to prohibit harassment of one team member by another team member, supervisor, or anyone else on the basis of sex.

# Harassment Policy

## Definition:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

# Harassment Policy

## Reporting:

Any team member who feels that he or she is a victim of sexual harassment or any other form of harassment should immediately report the matter to their supervisor, the Director of Human Resources or other management team member. Violations of this policy will be considered serious team member misconduct and may result in discipline up to and including discharge. Sexual harassment and any other harassment of a team member will not be tolerated. All complaints of harassment will be investigated immediately and kept confidential to the extent possible. It is our policy that no team member shall suffer retaliation or adverse consequences as a result of reporting violations of this policy or participating in the investigation of such violations.

THE LAW OFFICES OF



**GIBBEL KRAYBILL & HESS** <sup>LLP</sup>

ATTORNEYS & COUNSELORS AT LAW

# QUESTIONS & ANSWERS

© Gibbel Kraybill & Hess LLP 2018