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The Women's Bar Association of the State of New York

presents

Convention 2021
Continuing Legal Education Series

Diversity & Inclusion – Considerations in 2021 & Beyond

May 21, 2021
9:00 am - 10:00 am

Presenter: Prof. Michael L. Fox, JD

1 **Diversity & Inclusion – Considerations in 2021 & Beyond**

Prof. Michael L. Fox, J.D.
Assistant Professor & MBA Coordinator
Mount Saint Mary College
Assistant Adjunct Professor of Law *Columbia University School of Law*

May 21, 2021

Women's Bar Association of the State of New York – Annual Convention 2021

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

3 ***What We Will Address Includes:***

***NY Human Rights Law**

***Federal Title VII, Pregnancy Discrimination Act and Religion**

***Protection of Sexual Orientation Class, and What's Next**

***Americans with Disabilities Act, and COVID Vaccines**

***Accessible Websites**

***Equal Pay Issues**

***What About the Federal Equal Rights Amendment as of 2021?**

***Conclusion and Any Questions**

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

The Bill(s) ("Amendments Act" to the NYS Human Rights Law, *et al*.) that passed the Assembly and Senate, were signed by Governor Cuomo on August 12, 2019.

Some changes were immediate, and others took effect 60, 180 or 365 days later.*

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

5 ☐ **New York Human Rights Law/Executive Law**

▶N.Y. Executive Law § 290, *et seq*.

▶*Applies to employers of 4 or more (CHANGES – Amendments Act reduces number to 1 employee or more in cases of discrimination and harassment – prior to this, was 1 only for alleged sexual harassment. In addition, protection for domestic workers extended to match basis for harassment claims for other employees under NYS HRL).*

▶"1. The opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right."

▶"2. The opportunity to obtain education, the use of places of public accommodation and the ownership, use and occupancy of housing accommodations and commercial space without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, as specified in section two hundred ninety six of this article, is hereby recognized as and declared to be a civil right."

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

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

6 ☐ **Be Careful Employers – Employees "Too Cute"?**

▶In the case of Edwards v. Nicolai, 153 A.D.3d 440, 60 N.Y.S.3d 40 (1st Dep't 2017), plaintiff was terminated as a yoga and massage therapist at a chiropractic practice because the wife and co-owner of the business believed plaintiff was "too cute", and the wife was becoming jealous that the husband co-owner of the business might become attracted to the plaintiff.

▶There was no inappropriate interaction between plaintiff and the defendant husband. However, the First Department reversed the trial court, and held that the circumstance of plaintiff's firing was sufficient to raise a claim of gender discrimination under both the State and New York City Human Rights laws.

➢Compare with Nelson case in Iowa.

7 ☐ ***Aiding & Abetting***

▶In New York - § 296(6) prohibits aiding and abetting discrimination. Can be claim against individual person. Must prove the underlying discrimination claim first. See Haggood v. Rubin & Rothman, LLC, 2014 WL 6473527 at *22 (E.D.N.Y. 2014); Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 314 (N.Y. 2004).

▶So could be asserted against a manager or supervisor, or someone else in the company, who as an individual contributed to, aided or abetted the discriminatory treatment.

▶Not available claim under Federal law.

▶*Changes in NY Law (Amendments Act added term "private employer" including "person". Could result in individual liability for employer, in cases of discrimination, harassment or retaliation. May no longer need Aiding & Abetting, and showing of underlying liability first)*

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▶With regard to claims of Sexual Harassment – Briefly on three (3) laws in New York, following signing of the New York State 2019 Budget Bill by Governor Cuomo.

❖New Section 201-g of the Labor Law (eff. Oct. 9, 2018) – Requires DOL and DHR to create and publish a model sexual harassment policy, with the following: *inter alia*, to prohibit harassment, include information on statutory provisions, include a standard complaint form, and inform employees of their rights. DOL and DHR must also produce a model sexual harassment prevention training program for the workplace. Employers must have written policies, and training, covering specific issues – *inter alia*, examples of conduct, remedies, standard complaint forms, procedures, and anti-retaliation provisions. *All bidders for state contracts must certify they implemented written policies for harassment prevention and provide annual training, covering the above. Employers will have to provide at time of hire, and annually, notice and the provisions of the policies.*

❖New Section 296-d of the Executive Law (Human Rights Law) (eff. immediately) – expands liability and the negligence standard for an employer to prevent or stop harassment of an employee by a co-worker to harassment by an employee of a non-employee (consultant, vendor or contractor). Never included before. If know or should have known a non-employee sexually harassed in the employer's workplace, must address it. *[Note: Employers are already obligated to assist and protect employees harassed by non-employees or vendors – ex. of waitress and diner patrons.]* *Change* *– Will expand this provision to other forms of discrimination and harassment.*

❖New Section 7515 of the CPLR – Prohibits (unless inconsistent with federal law) pre-dispute mandatory arbitration provisions that require the parties to arbitrate sexual harassment claims, as those provisions are included in written contracts entered after July 11, 2018; and would make clauses void in existing agreements after effective date, except for the arbitrability of other claims. *Does not impact agreements made after a dispute arises.* *Change* *– Expanded to all harassment, discrimination and retaliation claims. Some note there may be federal pre-emption challenges here under the FAA.*

✓There are also amendments to CPLR 5003-b and General Obligations Law § 5-336 (eff. July 11, 2018), which will limit the use of confidentiality and non-disclosure agreements connected to resolution of sexual harassment claims in New York. Plaintiff employees must have 21 days to consider any provision, and 7 days to revoke after signing (which revokes entire agreement); and terms preventing disclosure of underlying facts and circumstances due to confidentiality must be at the plaintiff employee's preference. As of January 2020, express provision must also exist to advise employee they may speak with counsel, EEOC, etc. *Change* *– Non-disclosure must be at claimant's preference; includes all discrimination, harassment and retaliation claims; cannot prevent initiating, assisting or complying with subpoena in case or investigation; cannot prohibit disclosing facts for filing for Medicaid, unemployment, or other benefits.*

See Special Bulletin, Stroock & Stroock & Lavan, LLP (Apr. 17, 2018); Schwartz & Salins, *New York*

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

9 **Title VII of the Civil Rights Act**

▶Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) (Title VII), as amended, 42 U.S.C. § 2000e, *et seq*.

▶Not every employer is an "employer" under the Act.

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

10 **Title VII**

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

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

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

42 U.S.C. § 2000e-2 (emphasis added)

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

11 **Important to Note:**

▶Congress did validly abrogate state sovereign immunity under the 14th Amendment in Title VII. Abdalla v. Tenn. Dep't of Corrections, 2021 WL 27305 at *4 (W.D. Tenn. Jan. 4, 2021) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456-457 (1976)).

▶But, the ADA and ADEA did not abrogate 11th Amendment state sovereign immunity – see Abdalla, 2021 WL 27305 at *3 (citing Kimel v. Florida Bd. of Regents, 528 U.S. 62, 92 (2000); Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (holding that Congress could not use the Fourteenth Amendment to abrogate state sovereign immunity under the ADA because there was no pattern of discrimination and the remedy was not congruent and proportional to the targeted violation)).

12 **Pregnancy Discrimination**

- The Pregnancy Discrimination Act was an amendment to Title VII. 42 U.S.C. § §2000e(k). The New York State Human Rights Law and New York City Human Rights Law also prohibit pregnancy discrimination.

- According to the EEOC: "Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII, which covers employers with 15 or more employees, including state and local governments. Title VII also applies to employment agencies and to labor organizations, as well as to the federal government. Women who are pregnant or affected by pregnancy-related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations." https://www.eeoc.gov/facts/fs-preg.html

- Even if the pregnancy ends before lawsuit commenced, okay because pregnancy is a situation with a finite period of time, so long as the claim is filed within the governing statutes of limitation.

13 **A brief mention – Equal Pay**

- Recent court decision of the United States Court of Appeals for the Ninth Circuit (based in San Francisco, California). The original decision held that when it comes to pay differentials in the workplace and pay decisions by employers, prior salaries may be considered if the pay differential based on prior salary is based on any factor other than sex (gender), and it is up to the employer to show that it was the factor other than sex (gender) that caused the pay differential when there are legal challenges based on claims of gender discrimination. See Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2017). However, after rehearing *en banc* was granted 869 F.3d 1004 (9th Cir. Aug. 29, 2017), the Ninth Circuit reversed that holding, and overruling Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982), and held that the Equal Pay Act clearly provides that an employer cannot justify a pay differential between men and women by relying on prior salary. *See* Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018) (Reinhardt, J.). BUT reversed by U.S. Supreme Court because Judge Reinhardt passed away before decision rendered. *Re-heard by Circuit, and in 2020 – same result in 9th Circuit.*
- *Consider this – using prior salary as a justification would basically permit the perpetuation of discrimination. If the prior salary was lower simply based on the sex/gender of the employee, then use of that prior salary to justify a present salary perpetuates the discrimination.*
- Compare the Ninth Circuit decision with two legislative acts closer to home: (1) New York State's Pay Equity Act in 2019, signed by Governor Cuomo in July 2019; and (2) New York City Local Law 67 of 2017, codified at N.Y.C. Admin. Code § 8-107(25). The State Law prohibits differences in pay based on any protected class characteristic. They both forbid employers from inquiring about prior salaries at any stage of the interview process. If the interviewer already knows the prior history, that information cannot be relied upon in determining compensation of the employee. In New York City, *the employer can inquire as to salary and benefits expectations. In addition, if the interviewee truly volunteers the information, the employer can verify the information, and can then consider the history.* See, *inter alia*, http://pubadvocate.nyc.gov/ news/articles/groundbreaking-equal-pay-legislation-passes-new-york-city; https://davidrichlaw.com/ employers-in-new-york-city-barred-from-asking-about-salary-history-of-job-applicants/.

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- See also, for comparison, recent statutory enactment in Iceland, which took effect in 2018.

▶257 years to reach pay parity at present rate! And, the fact that women must work longer than 12 months for equivalent pay on average.

15 **Also Be Cautious About Implicit Bias: Unconsciously or Subconsciously Applying Certain Characteristics to Certain Groups**

▶See Shayon T. Smith, *No I'm Not the Court Reporter: Tips for Tackling Implicit Bias (Commentary)*, N.Y. L.J. (Jan. 7, 2020).

▶"I'm sorry, you just don't look like a lawyer."

▶Changing treatment and attitudes means not just addressing explicit bias – but also implicit bias, the bias that exists even if we do not necessarily intend for it.

16 **Contracts – Section 1981**

▶The Civil Rights Laws, and providing protection in "all phases and incidents of the contractual relationship"

▶Comcast Corp. v. Nat'l Assoc. of African Am.-Owned Media, 140 S.Ct. 1009, 1020 (2020) (Ginsburg, J., concurring).

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▶Under Section 1981, a plaintiff is not restricted to suits against only state actors or actions under color of state law. Section 1981 claims may be brought against non-governmental (i.e. private) defendants. Further, just as with Section 1983, a Section 1981 plaintiff must prove their case pursuant to a "but-for causation standard." As the Supreme Court of the United States made clear in 2020:

> It is "textbook tort law" that a plaintiff seeking redress for a defendant's legal wrong typically must prove but-for causation…. Under this standard, a plaintiff must demonstrate that, but for the defendant's unlawful conduct, its alleged injury would not have occurred. This ancient and simple "but for" common law causation test, we have held, supplies the "default" or "background" rule against which Congress is normally presumed to have legislated when creating its own new causes of action…. We don't doubt that most rules bear their exceptions. But, taken collectively, clues from the statute's text, its history, and our precedent persuade us that § 1981 follows the general rule. Here, a plaintiff bears the burden of showing that race was a but-for cause of its injury. And, while the materials the plaintiff can rely on to show causation may change as a lawsuit progresses from filing to judgment, the burden itself remains constant.

▶Comcast Corp., 140 S.Ct. at 1014-1015 (Gorsuch, J.).

18 **Religion and Employment**

▶Note that with regard to a juxtaposition of Title VII and protection for religion, a broad exception also exists under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. "RFRA provides 'very broad protection for religious liberty' by exempting religious believers from laws that substantially burden the exercise of their religious beliefs…. The Government must provide such an exemption unless the application of the law to the believer is the 'least restrictive means' of furthering a 'compelling government interest.'… A RFRA claim may be brought as an affirmative defense to criminal charges…. The Act was passed after the Supreme Court held—reversing prior

case law—that the Free Exercise Clause of the First Amendment 'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.'… Congress enacted RFRA in response, seeking to 'restore' religious exemptions from nondiscriminatory 'rule[s] of general applicability.'… RFRA therefore reflected Congress' judgment that 'laws [that are] "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.'… To succeed on a RFRA defense, a claimant must first make two showings: (1) governmental action burdens a sincere 'exercise of religion' and (2) the burden is 'substantial.'… A RFRA claim that does not establish these two elements fails…. If a claimant does demonstrate a substantial burden on her sincere exercise of religious belief, a court must find a RFRA violation unless the Government demonstrates that 'application of the burden to the person' both (1) 'furthers a compelling governmental interest' and (2) 'is the least restrictive means of furthering that compelling government interest.'"

- U.S. v. Hoffman, 436 F.Supp.3d 1272, 1279-1280 (D. Ariz. 2020) (Márquez, D.J.) (citing, *inter alia*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 693, 134 S.Ct. 2751 (2014); Employment Div. v. Smith, 494 U.S. 872, 879, 110 S.Ct. 1595 (1990); 42 U.S.C. § 2000bb).

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- In a civil action, "'A person who brings a challenge under RFRA bears the initial burden of proving that (1) the Government's policy or action implicates her religious exercise, (2) the relevant religious exercise is grounded in a sincerely held religious belief, and (3) the policy or action substantially burdens that exercise.'… If the person establishes a prima facie RFRA violation, then the burden shifts to the government to demonstrate that the government interest is compelling, and its action is the least restrictive means."
- Sabra as next friend of Baby M v. Pompeo, 453 F.Supp.3d 291at 325 (D.D.C. 2020) (Sullivan, D.J.) (The protections instituted by Congress in the RFRA exceed those in the First Amendment to the U.S. Constitution).
- Following the U.S. Supreme Court's decision in Bostock v. Clayton County, 140 S.Ct. 1731, some question what the impact will be if an individual discriminates against another because of sexual orientation or gender identity, and concomitantly seeks the shelter of the RFRA and First Amendment. *See* E. Chemerinsky, *Chemerinsky: Gorsuch Wrote His 'Most Important Opinion' in SCOTUS Ruling Protecting LGBTQ Workers*, ABA Journal (July 1, 2020).

- For further reference, the Supreme Court, in a decision at the end of the October 2019 Term (issued in summer 2020), evaluating arguments under the RFRA, ruled with regard to the contraceptive mandate that developed under the Patient Protection and Affordable Care Act ("Obamacare") "that the [federal] Departments had the authority to provide exemptions from the regulatory contraceptive requirements for employers with religious and conscientious objections." *See* Little Sisters of the Poor Sts. Peter & Paul Home v. Pa., 140 S.Ct. 2367 (July 8, 2020) (Thomas, J.).

20 **Religious Beliefs & Accommodations**

- This area hinges both on employer and employee actions.
- Plaintiff must have a genuine religious practice, conflicting with a requirement of the job (this is usually work schedules and observance of Sabbath days). Plaintiff's *prima facie* case – (1) *bona fide* religious beliefs, conflicting with employment requirements, (2) employer informed, and (3) employee disciplined or suffers adverse employment action because of conflict with employment requirements.
- Also, employer, when on notice, must offer reasonable accommodation (we will discuss more when we get to ADA).

- ▶If employer offers full accommodation, it does not have to be what the employee requests. It must simply resolve the conflict completely. See Mereigh v. N.Y. & Presbyterian Hosp., 2017 WL 5195236 (S.D.N.Y. Nov. 9, 2017).
- ▶BUT, if employer fails, and accommodation offered does not fully resolve conflict, then employer faces liability. See Jamil v. Sessions, 2017 WL 913601 (E.D.N.Y. Mar. 6, 2017).
- ▶If employee fails to act in good faith, and rejects accommodation for unacceptable reason (such as "family reasons" not religious practices), then employer generally not liable. See Moore v. City of New York, 2018 WL 3491286 (S.D.N.Y. July 20, 2018).

21 **A note on Age**

- The federal *Age Discrimination in Employment Act (ADEA)* has provisions prohibiting both disparate treatment (§4(a)(1)) and disparate impact (§4(a)(2)) based on age.

- However, the 7th and 11th Circuits have both held that with regard to disparate impact claims, protections only extend to employees, NOT applicants.

- Kleber v. CareFusion Corp., 914 F.3d 480 (7th Cir. 2019) (*en banc*) (citing Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958, 964 (11th Cir. 2016) (*en banc*)).

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

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

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

adversely affect his status as an employee'—to extend the proscribed conduct. Congress's word choice is significant and has a unifying effect: the use of "or otherwise" serves to stitch the prohibitions and scope of § 4(a)(2) into a whole,…."

24 **Now, For a claim of discrimination to be made…**

▶Unless a disparate impact or disparate treatment claim – where the single incident is the discrimination suffered – a claim must be more than episodic. See Moore v. City of New York, 2018 WL 3491286 (S.D.N.Y. July 20, 2018). Either continuing and pervasive discriminatory treatment or environment, or a single bad act that serves to alter the conditions of employment such to give rise to a claim. See 42 U.S.C. 2000e-2; Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59 (2d Cir. 1992); Galimore v. City Univ. of New York Bronx Comm. College, 641 F.Supp.2d 269 (S.D.N.Y. 2009).

▶Employer must be on notice, unless supervisor or manager commits the claimed acts, in which case employer is deemed bound and vicariously liable.

▶"Supervisor" – Not all supervisors are "supervisors" such that their actions can bind the company. Following the U.S. Supreme Court's decision in Vance v. Ball State University, 133 S.Ct. 2434 (2013), the Court held that: "an employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim".

▶Otherwise, the employee is a co-employee or co-worker, and the victim must report up the chain or otherwise place a supervisor or manager (the company) on notice of the issue/complaint, so that the employer has an opportunity to correct. If the manager/supervisor, company officer, "the boss" is witnessing and not correcting, or indirectly participating, then argument can be made that notice provided.

▶Employee must also suffer an adverse employment action. Absent that, there is no claim. *See* Gibson v. N.Y.S. Office of Mental Health, 6:17-CV-0608 (GTS) (N.D.N.Y. Apr. 24, 2018) (Suddaby, C.J.).

25 **McDonnell Burden Shifting Analysis**

▶McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Burden first on the plaintiff – *prima facie* case of discrimination. Showing: (1) that she is within a protected group; (2) that she applied for and was qualified for the job at issue; (3) that she was subjected to an adverse employment action; and (4) that this action occurred under circumstances giving rise to an inference of discrimination….

❖Burden is not usually a high one, but plaintiffs have failed.

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

Strahan was hired as the new co-anchor.

Plaintiff's case was dismissed.

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

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

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

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

28 **Federal & NY – Same Standard***

- ▶Claims under New York's Human Rights Law are governed by the same standards of recovery as under Federal Title VII.

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

❖*However – Changes in NY – The Amendments eliminate the "severe or pervasive" standard for

claims of hostile work environment. Aligns with NYC HRL. Will be unlawful to subject an individual to "inferior terms, conditions or privileges of employment because of the individual's membership" in any protected class under the NYS HRL. No need to show repetitive if it exists. *BUT – affirmative defense will remain – where "harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences." So, in a sense maintains the objective and subjective measures.*

❖*In addition – for cases filed on or after the 60th day after NY's Governor signed Amendments, plaintiffs will no longer need to compare themselves to others similarly situated but not belonging to same protected class for employment discrimination claims (i.e. employee violates policy, punished less harshly than others). Will instead be "[n]othing… shall imply that an employee must demonstrate the existence of an individual to whom the employee's treatment must be compared."*

29 ☐ **BUT, Different Damages Available**

▶Under Federal Law – Have the potential ability to recover compensatory damages, back pay, front pay, emotional distress, punitive damages, and attorneys' fees.

▶Under NY State Law – Ability to recover compensatory damages, but no punitive damages, and no attorneys' fees in any actions except (as of January 2016) those for discrimination based on sex – and for those, any prevailing party can seek attorneys' fees.*

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

30 ☐ **Retaliation**

▶Under both the NY law and federal law, it is a separate violation if an employee suffers an adverse employment action, termination or otherwise, for their having opposed discrimination suffered by another, participated in an investigation, supported the claim of another, or filed a claim on their own behalf.

▶Remember – even if the employee's underlying claim of discrimination fails, the employee may still maintain a separate and substantiated claim of retaliation.

▶*This includes wrongful actions taken against an employee after an internal complaint, as well.* See Cook v. EmblemHealth Services Company, LLC, 167 A.D.3d 459 (1st Dep't 2018) ("The temporal proximity between plaintiff's complaints to his employer that he was subjected to racial stereotyping and discrimination and the termination of his employment in close succession to his last complaint is sufficient to raise an inference of a causal connection between plaintiff's protected activity and the disadvantaging employment action taken against him").

31 ☐ **Paperwork, Records & Policies**

▶"Paper can be your friend." Generally speaking – An employer is very much benefitted by maintaining an adequate paper file, including a thorough personnel file, for all employees. If or when claims of discrimination are filed, the employer can immediately turn to the paper file for potentially defensive material.

▶Therefore, it is vital that the employer maintain a good filing system, with files maintained on all employees. Retain all copies of signed handbooks and policies, any contracts pertaining to that employee, any non-compete agreements, any non-disclosure agreements, any periodic reviews, write-ups, complaints or disciplines against an employee, as well as any commendations received

by the employee (those can also be useful in a litigation). Of course, all record-keeping *must* be done *accurately*.

- ▶Finally, documentation from any meeting with an employee should include the names of all of those present – and management should ensure that at least two persons are present representing the company. A meeting for reprimand or commendation should not be attended by only one manager and the employee.
- ▶The employee should sign all paperwork, and all reviews, write-ups or commendations. If the employee refuses, a note should be made. Of course, if the workplace is unionized, a union representative must accompany the employee, and the CBA will govern the interactions between management and the employee.

32 **Remember….**

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

33 **Federal, New York State and New York City: Employer Defenses (*Change – NYS eliminated)***

- ▶Under Federal law and New York State law (*currently*), in cases of sexual harassment, employers have a potential defense available to them – pursuant to the line of cases stemming from Faragher-Ellerth. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
- ▶"The Faragher/Ellerth defense consists of two elements providing that even if a supervisor's behavior resulted in a tangible employment action against the plaintiff, the employer will not be liable if (1) 'the employer exercised reasonable care to prevent and correct promptly any [discriminatory] harassing behavior,' and (2) 'the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.'… With regard to the first element, the maintenance of a written anti-harassment policy providing a procedure for an employee who is the victim of harassment to report the harassment to the Defendant for investigation satisfies the first element…. 'With regard to the second element, "proof that an employee has unreasonably failed to use the employer's complaint procedure normally suffices to satisfy the employer's burden."'" Green v. Avis Budget Group, Inc., 2017 WL 35452, at *21 (W.D.N.Y. Jan. 4, 2017) (citing, *inter alia*, Ferraro v. Kellwood Co., 440 F.3d 96, 102 (2d Cir. 2006)); Poolt v. Brooks, 38 Misc.3d 1216(A), 967 N.Y.S.2d 869 (Table), 2013 WL 323253 (Sup. Ct. N.Y. County 2013) (providing that a first element is that no adverse action was taken).

- ▶New York City has eliminated the Faragher-Ellerth defense under its local law NYCHRL. Belton v. Lal Chicken, Inc., 138 A.D.3d 609 (1st Dep't 2016). "The NYCHRL imposes strict liability on employers for discriminatory acts of managerial employees." Roberts v. United Parcel Service, Inc., 115 F.Supp.3d 344, 368 (E.D.N.Y. 2015) (citing Garrigan v. Ruby Tuesday, Inc., No. 14–CV–0155, 2014 WL 2134613, at *6 (S.D.N.Y. May 22, 2014); N.Y.C. Admin. Code § 8–107(13)(b)(1)).
- ▶NYS under Amendments Act also eliminated in NYSHRL cases – even if employee does not make use of employer's policies and procedures, and complain to employer, no defense to employer under State law.

34 **Managing Internal Complaints**

- ▶When the company or a supervisor receives a complaint, there are several best practices that should be followed.
- ▶First, always remember the Faragher-Ellerth defense in the case of sexual harassment claims (See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)) (*no longer in New York*). Do not discount an employee's complaint. Take action. Also remember the Vance v. Ball State University, 133 S.Ct. 2434 (2013), decision, and the aiding and abetting provisions of the New York State Human Rights Law. If a supervisor fails to investigate complaints, "turns a blind eye", takes part in the discrimination through silence or constructive approval, or otherwise fails to protect an employee's rights, the company and that supervisor may face liability.
- ▶Make sure that the person or team appointed to make the investigation is not in any way named or involved in the complaint itself.
- ▶Interviews should be handled discreetly, but thoroughly. Speak to all witnesses.
- ▶Document, document, document. Keep records/notes of interviews, investigation avenues, and findings.
- ▶Meet with the complaining employee, and keep them apprised of the final decision of the company. Never meet one-on-one, and always have at least two managers/company representatives present.
- ▶If their complaint is determined to be unfounded, explain whether the employee has any internal appeal routes.
- ▶Of course, if the workplace is unionized, the union representatives should be kept apprised, and the CBA should be followed concerning any grievance procedures and appeals.
- ▶Remember that retaliation can be the basis for a separate lawsuit, even if the discrimination complaint is unfounded or baseless. Therefore, inform all supervisors and managers that they are to treat all employees and all investigations with respect, regardless of their feelings concerning the subject of the complaint, or about the person making the complaint.

35 **Sexual Orientation & Title VII Nationwide – 2020**

- ▶New York Governor Andrew Cuomo was the first to issue statewide regulations to prohibit harassment and discrimination on the basis of gender identity, transgender status or gender dysphoria – regulations through the N.Y. DHR. The New York City CHR had done so, as well.

- ▶Just recently the EEOC tried again to bring a claim under Title VII based on sexual orientation. It was initially rebuffed by the Seventh Circuit Court of Appeals. See Hively v. Ivy Tech Comm. College, South Bend, 830 F.3d 698 (7th Cir. 2016). HOWEVER, that decision was vacated in October 2016 when the Seventh Circuit voted to rehear the case *en banc*. A new decision was just recently issued – 853 F.3d 339 (7th Cir. 2017) (*en banc*) – the first to hold Title VII does protect sexual orientation – a bellwether on this front.

36 **Then…**

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

37 **Also Recently,**

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

38

- *The U.S. Supreme Court declined to hear an appeal of an 11th Circuit decision holding Title VII did not protect against discrimination on the basis of sexual orientation. Evans v. Georgia Regional Hosp., 138 S.Ct. 557 (Mem) (2017).*

- *BUT, the 11th Circuit also held in another case that Title VII did not protect sexual orientation.*

Bostock v. Clayton County, Georgia.

- ▶Bostock, Zarda and E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), went up in a consolidated appeal to the U.S. Supreme Court.

- ▶The Circuit split was resolved by the U.S. Supreme Court on June 15, 2020, in the Bostock decision.
- ▶Sexual orientation and gender identity are protected classes under Title VII's "because of… sex" language. 140 S.Ct. 1731, 2020 WL 3146686 (June 15, 2020).
- ▶The First and Third Circuits had never ruled in the affirmative on this issue, thus in Pennsylvania, New Jersey and Massachusetts on either side of New York State, prior to Bostock in June 2020, sexual orientation was not a protected class under Title VII federally.

- ❖*Question now* – Fulton v. Phila. – U.S. Supreme Court this Term 2020-2021. Will the RFRA hold? Will Bostock hold? Other precedents? We will see.

39 ☐ **Americans with Disabilities Act ("ADA")**

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

40 ☐ **To Qualify:**

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

41 ☐ **ADA**

- ▶According to the EEOC: "Employment discrimination is prohibited against 'qualified individuals with disabilities.' This includes applicants for employment and employees. An individual is considered to have a 'disability' if s/he has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Persons discriminated against because they have a known association or relationship with an individual with a disability also are protected."
- ▶"The first part of the definition makes clear that the ADA applies to persons who have impairments and that these must substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered, but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered."

- "The second part of the definition protecting individuals with a record of a disability would cover, for example, a person who has recovered from cancer or mental illness."
- "The third part of the definition protects individuals who are regarded as having a substantially limiting impairment, even though they may not have such an impairment. For example, this provision would protect a qualified individual with a severe facial disfigurement from being denied employment because an employer feared the 'negative reactions' of customers or co-workers."
- https://www.ada.gov/q&aeng02.htm

42 **ADA Amendments Act of 2008**

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

43 **ADA Amendments Act of 2008**

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

44 **What is a "Reasonable Accommodation"?**

- The EEOC defines this as "any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities."

- https://www.ada.gov/q&aeng02.htm
-
- May include accommodations for those employees suffering from depression. See Klein & Pappas, *Reasonable Accommodations for Employees Suffering from Depression*, N.Y.L.J. at p. 3 (Dec. 5, 2018).

45 **Compare with a Reasonable Modification**

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

46 **Interactive Process**

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

47 **Training**

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

48 **Two Notes for Thoughts**

1. Protection under the ADA is like a parabola.

2. The "Bermuda Triangle" of disability and benefits laws.

49 **So what about Websites? Does your website have to be ADA Compliant?**

- ▶Is it a violation of Title III of the ADA if someone with a disability is not able to utilize your website in the same fashion as someone without a disability?

▶Well – at the moment it depends….

▶But size of business does not matter – Title III of the ADA applies to all *places of public accommodation*.

50 ☐ ***Do you have a brick and mortar location, with an attendant website?***

▶Courts are almost uniform here.

▶Mahoney v. Herr Foods Inc., 2020 WL 1979153 at *2-*3 (E.D. Pa. Apr. 24, 2020) (Baylson, D.J.) (discussing Circuit split; determining that in the Third Circuit, a website must have a nexus to a physical business location in order to be considered a *place of public accommodation* governed by Title III of the ADA) (citing and following Ford v. Schering-Plough Corp., 145 F.3d 601, 612 (3d Cir. 1998)).

▶*See also* Earll v. eBay, Inc., 599 Fed. Appx. 695, 696 (9th Cir. 2015) ("We have previously interpreted the term 'place of public accommodation' to require 'some connection between the good or service complained of and an actual physical place'"); Ford v. Schering–Plough Corp., 145 F.3d 601, 612–14 (3d Cir. 1998) ("rejecting the reasoning in Carparts and holding that 'public accommodation' does not refer to non-physical access").

▶Joining the 3rd Circuit currently are the Fifth, Sixth, Ninth and Eleventh Circuits.

51 ☐ ***Are you a purely online business website, with no nexus to a physical building?***

▶There is a clear Circuit split at the moment here.

▶The Second Circuit U.S. Court of Appeals has not, as of the time of this writing, specifically and directly addressed the application of the ADA to online services/the Internet – although in one decision that court did apply the ADA to insurance services, even if those services were provided entirely online, and regardless of nexus to a physical building). Thorne v. Formula 1 Motorsports, Inc., 2019 WL 6916098 at *2 (S.D.N.Y. Dec. 19, 2019) (Oetken, D.J.); Pallozzi v. Allstate Life Ins. Co., 198 F.3d 28 (2d Cir. 1999), *op. amended on denial of reh'g*, 204 F.3d 392 (2d Cir. 2000) (Leval, J.).

▶However, given the caselaw that exists, it appears the courts in the Second Circuit are open to enforcing Title III against a purely web-based business' activities. Joining the 2rd Circuit currently are the First and Seventh Circuits.

▶*See also* Access Now, Inc. v. Blue Apron, LLC, 2017 WL 5186354 (D.N.H. Nov. 8, 2017) (Laplante, D.J.) (discussing cases and circuit split).

52 ☐ **Note an issue when it comes to "places of public accommodation" under Title III:**

▶Dominguez v. Banana Republic, LLC, --- F.Supp.3d ---, 2020 WL 1950496, at *7 (S.D.N.Y. Apr. 23, 2020) (Woods, D.J.) ("Courts in this district have already addressed the question of what constitutes a 'place' for the purpose of Title III in the context of deciding that websites are places of public accommodation…. In short, those courts have read the word 'place' broadly to include every 'sales or rental establishment' and 'service establishment.'") (citing, *inter alia*, Andrews, 268 F.Supp.3d at 393). *But see* Dominguez v. Taco Bell Corp., --- F.Supp.3d ---, 2020 WL 3263258 (S.D.N.Y. June 17, 2020) (Schofield, D.J.) (distinguishing Banana Republic, finding gift cards are not a place of public accommodation ("a place where goods and services are provided"), but rather a way to acquire goods, and plaintiff failed to plead facts showing defendant did not offer auxiliary

aids or services sufficient to permit use of the information on the gift cards; thus the court dismissed plaintiff's lawsuit alleging failure to provide gift cards in braille for blind patrons violated the ADA).

▶*See also* Jenna Greene, *Judge Shreds First of 200+ ADA Suits Demanding Gift Cards in Braille*, N.Y.L.J. at p. 6, May 4, 2020 (discussing the filing of more than 200 lawsuits against retailers claiming gift cards not in braille violated the ADA; and addressing that Banana Republic was the first of a number of cases where these claims were dismissed – both on the basis of standing (failure on the prong of intent to return), and for lack of Title III regulation/applicability (since gift cards are not "places of public accommodation")).

53 **Okay, Title III applies, and you have a website with a phone number people can call if they have issues navigating – is that a sufficient auxiliary aid?**

▶NO.

▶In the case of Juscinska v. Paper Factory Hotel, LLC, 2019 WL 2343306 at *3 (S.D.N.Y. June 3, 2019) (Carter, D.J.), a plaintiff with cerebral palsy brought suit against a hotel owner/operator alleging violations of Title III of the ADA, as well as the N.Y.S. and N.Y.C. Human Rights Laws, alleging that the hotel's website did not pro-vide room accessibility information for disabled guests, but provided full online service to the non-disabled. The Court, in denying defendant's motion to dismiss, noted: "Here, as alleged in the Complaint, Plaintiff was not able to browse Defendant's website and make a reservation with the same efficiency, immediacy, and convenience as those who do not need accessible guest rooms. . . . Plaintiff was unable to discern the accessible features of rooms that would meet her needs. . . . Defendant's website did not provide Plaintiff with the opportunity to evaluate the suitability of common areas and the amenities Defendant provides to its guests. . . . Taking the facts in the Complaint as true, it is plausible that, at the time Plaintiff visited Defendant's website, it was not compliant with the ADA as interpreted by the DOJ."

54

▶Furthermore, the Court disagreed with defendant that the hotel's 24/7 telephone line, to which prospective guests could pose questions, was an acceptable auxiliary aid and service that would moot plaintiff's claims. Id. at *4 (". . . at this stage, the mere availability of a phone service does not mean that Plaintiff has or is treated the same as other individuals. The ability and ease in which someone can research and reserve a room in a hotel is a service. In her Complaint, Plaintiff sufficiently alleges that she was denied that service based on her disability").

▶*See also* Parks v. Richard, 2020 WL 2523541 at *2 (M.D. Fla. May 18, 2020) (Chappell, D.J.) ("ADA website cases are somewhat tricky because courts nationwide are trying to fit the square peg of an online injury into the round hole of traditional standing analysis…. And there is little authoritative guidance to help district courts…. Fortunately, cases across the Middle and Southern Districts addressed an ADA tester's standing for this type of hotel website case. Each concluded allegations like Parks' show standing for an injury…. Here, the website failed to identify the motel's accessible features or allow booking of accessible rooms. So the Court concludes Parks alleged he suffered an injury in fact by encountering barriers that violate the ADA") (citing Price v. Escalante - Black Diamond Golf Club LLC, 2019 WL 1905865 (M.D. Fla. Apr. 29, 2019); Poschmann v. Fountain TN, LLC, 2019 WL 4540438 at *2 (M.D. Fla. Sept. 19, 2019)); 42 U.S.C. § 12182(b)(1)(A)(iii); 28 C.F.R. § 36.202(c) ("Separate benefit. A public accommodation shall not provide an individual or class of individuals, on the basis of a disability or disabilities of such

individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others."). *But cf.* 28 C.F.R. § 36.303 ("auxiliary aids & services", when qualifying).

▶

55 **Can Employers Require COVID Vaccinations? – *Current Issues***

56 **The Federal Equal Rights Amendment in 2021?**

▶First country to grant women the right to vote? – New Zealand 1893

▶U.S.? 1920 – 19th Amendment. 12th nation to do so – although Native Americans not until 1965 Voting Rights Act (similar to Canada and Australia also excluding their First Nation and Aborigines)

▶1923 – Seneca Falls – first proposal of the ERA

▶Every Session of Congress between then and 1972

▶Finally passes 2/3 of each House of Congress in 1972 – ratified by Hawaii same day

▶Expired, extended, expired. Only 35 states ratified. Needed 38. NYS was one

▶After that: 2017 – Nevada. 2018 – Illinois. Then… 2020 – Virginia. 38! Ratified?

▶BUT – U.S. District Court, District of D.C. ruled in early 2021 that Congress can set deadlines for ratification. Expired. Likely to be appealed

▶In addition – moot at the moment – several states REVOKED their ratification votes. Issue about whether they can do that – no precedent

▶Why Constitutional Amendment? More permanent – statutes can change

57 **Now – Some Problems/Scenarios**
to Consider and Discuss:

58

Hypothetical #1 – Refusal of Service to a Customer

▶You operate a business in the wedding industry, and a customer comes in requesting your services for their wedding.

▶You say "very well, let's discuss your plans."

▶You then determine that the wedding will be of two same-sex partners.

▶You advise the customer that this is against your religious beliefs, and you will not accept their wedding business. However, if they wish to have some other business services, you will provide those separate from anything specifically involved with or supporting the same-sex wedding.

▶The client/customer declines, and then brings suit against you for discrimination.

▶What result?

59

▶Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, --- U.S. ---, 138 S.Ct. 1719 (June 4, 2018) (Kennedy, J.).

▶Did not address First Amendment rights broadly, and focused instead on narrowly ruling for the Cakeshop on First Amendment free exercise grounds – protection of religious beliefs against open hostility.

▶Court's majority decision is a surgical exercise. The rights of gays and lesbians can be exercised on equal terms to others, and are accorded great respect, but so are the religious and

philosophical objections to gay marriage. However, those objections cannot be the basis of denial of services and equal access to services and goods under neutral public accommodations law. But, the Colorado Commission did not comply with requirement for religious neutrality in its assessment of the baker's objections.

- ▶Court's majority made clear the decision was for this case only, and future cases would have to be resolved with further elaboration, and "tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."
- ▶Justices Breyer & Kagan concurred; Justices Ginsburg & Sotomayor dissented.
- ▶Court briefly addressed, and pushed aside, the idea of wedding cakes as art and pure speech. Only the concurrence of Justices Thomas & Gorsuch accepted that path – possibly because the others wished to avoid strict scrutiny protection for opponents of same-sex marriage, and those who might discriminate. *See* Mauro, *In 'Masterpiece' Case, Why Did SCOTUS Snub Wedding Cakes as Art?*, N.Y.L.J. at 2 (June 7, 2018).
- ▶Therefore, the case has limited application to future cases – BUT, indicates that the Court will not be receptive to decisions of lower tribunals that appear to be clearly hostile to religious beliefs when those beliefs, "based on sincere religious… convictions", are proffered as the basis for denial of services (as the Court held was the case with the Colorado Commission).

60 **Scenario 2**

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

61 **Questions:**

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

62 **<u>McGann v. Cinemark USA, Inc.</u>, 873 F.3d 218 (3d Cir. 2017)**

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

- ▶The U.S. District Court (Kelly, *Chief Magistrate Judge),* following a bench trial, issued a decision in favor of the theater owner.

63 **The Third Circuit**

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

64 **Scenario 3**

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

65 **Last Scenario**

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