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A Professional Law Corporation

2025 Employment Law Update

February 11, 2025

SHRM Salt Lake

Salt Lake SHRM and
Parsons Behle & Latimer
Present the 37th Annual

EMPLOYMENT LAW *Symposium*

TUESDAY, APRIL 8, 2025
8:00 AM -1:30 PM

PARSONS BEHLE & LATIMER

Grand America Hotel
555 Main St.
Salt Lake City, UT 84111

KEYNOTE SPEAKER

SCAN HERE

Emily M. Dickens, J.D.

Chief of Staff, Head of Government Affairs and Corporate Secretary for SHRM

Registration is Open at SLSHRM.org/Events

Presenters

SESSION ONE: 10 – 11 AM

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SESSION TWO: NOON – 1 PM

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Legal Disclaimer

This presentation is based on available information as of Feb. 11, 2025, but everyone must understand that the information provided is not a substitute for legal advice. This presentation is not intended and will not serve as a substitute for legal counsel on these issues.

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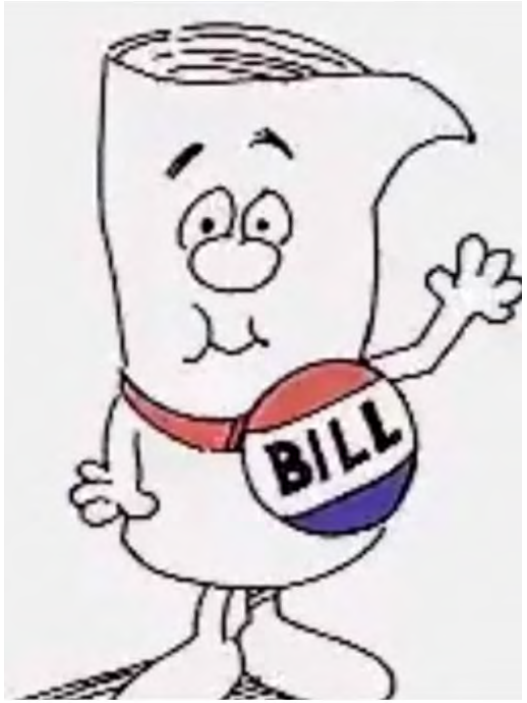

In 2024, the Utah Legislature passed 591 bills—a record number—including many employment related bills.

Utah Legislative Update

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Mark D. Tolman

H.B. 55 Employee Confidentiality Amendments

Effective May 1, 2024, but applies retroactively to Jan. 1, 2023.

Found at: https://le.utah.gov/~2024/bills/static/HB0055.html

- This bill renders void nondisclosure and nondisparagement clauses in employment agreements when those clauses could prohibit disclosures about sexual assault or sexual harassment.
- A severance agreement with a former employee may prohibit these types of disclosures, but such agreements are subject to a three-business day revocation right.

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Exclude sex assault and harassment from your definition of “confidential information”

Consider how you’ve defined “Confidential Information” in your contracts. If that definition is broad (most are), add a disclaimer like this:

The term Confidential Information shall not mean: (a) any information that is known by me prior to my employment, without an obligation of confidence; (b) any information that is publicly disclosed by the Company; or (c) information related to sexual assault or sexual harassment as those terms are defined under Utah Code § 34A-5-114.

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H.B. 396 Workplace Discrimination Amendments

Effective May 1, 2024.

Found at: https://le.utah.gov/~2024/bills/static/HB0396.html

This bill expands religious liberty protections:

- Prohibits an employer from **compelling an employee to engage in "religiously objectionable expression,"** i.e., expression that offends a sincerely held religious belief.
- Unless accommodating the employee would impose undue burden by interfering with (1) the employer's core mission or ability to conduct business in an effective manner or (2) the employer's ability to provide training and safety instructions."

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2024 state laws impacting only the public sector

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H.B. 261 Equal Opportunity Initiatives (aka the anti-DEI bill)

Compliance deadline is July 1, 2024.

Found at: https://le.utah.gov/~2024/bills/static/HB0261.html

- This bill impacts public colleges, universities, K-12 schools, and government offices, including to bar DEI offices at these institutions (or at least, that such offices be rebranded).
- Public employers may not request DEI statements from employees or applicants, i.e., a statement articulating the individual's position on diversity, equity, and inclusion.

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Is DEI a semantics game?

- UVU renamed its “Office of Inclusion and Diversity” to the “Office of Institutional Engagement and Effectiveness.”
- In other words, DEI became IEE.
- According to a report from the Salt Lake Tribune, UVU President Astrid Tuminez has stated that the name change would not alter the school’s ultimate mission of equity.

www.sltrib.com/news/education/2024/03/12/first-university-utah-renames-dei/

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H.B. 460 Government Employee Conscience Protection

Effective May 1, 2024.

Primary bill sponsor is Rep. Michael Peterson (District 2 – Cache)

Found at: https://le.utah.gov/~2024/bills/static/HB0460.html

- Allows governmental employees to request that their employer **relieve them from tasks that conflict with their sincerely held religious beliefs or "conscience."**
- The term "conscience" is defined as "a sincerely held belief as to the rightness or wrongness of an action or inaction."
- Accommodations must be granted unless doing so results in undue hardship.

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H.B. 460 Government Employee Conscience Protection -- Process

- **Employees** seeking to be relieved from performing tasks are required to **submit a written request** with an explanation for why the task would conflict with the employee's religious beliefs of conscience.
- After a request is received, a governmental entity must **respond within two days**.
- If the request is denied, the **governmental entity must provide a detailed explanation** of why excusing the task would impose an undue hardship.

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H.B. 460 Government Employee Conscience Protection -- Process

- Undue hardship is defined as "**a substantial increase in costs** to a governmental entity's operations and budget that would result from an employee being relieved from a certain task."
- The bill provides anti-retaliation protections.
- And allows an employee to sue to ask a judge to excuse them from the task ("injunctive relief") and may seek damages and attorney fees.

Bills pending or passed in 2025

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H.B. 267 Public Sector Labor Union Amendments

Passed the House and Senate. Governor Cox now must sign or veto.

Primary bill sponsors are Rep. Teuscher and Sen. Cullimore.

Found at: https://le.utah.gov/Session/2025/bills/static/HB0267.html

Utah bill to end collective bargaining for public workers passes, heads to Cox

HB267 bars government employers from recognizing a union as a bargaining agent.

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H.B. 267 Public Sector Labor Union Amendments

Passed the House and Senate. Governor Cox now must sign or veto.

Primary bill sponsors are Rep. Teuscher and Sen. Cullimore.

Found at: https://le.utah.gov/Session/2025/bills/static/HB0267.html

- Prohibits a public sector employer from recognizing a union as a bargaining unit and from signing a collective bargaining agreement.
- Does not prohibit public sector unions outright. For example, unions could still organize a strike.
- But without the power to collectively bargain, public sector unions may struggle to remain viable.

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H.B. 214 Employer Verification Amendments

Pending in the House Business, Labor and Commerce Committee

Primary bill sponsor is Rep. Walter

Found at: https://le.utah.gov/Session/2025/bills/static/HB0214.html

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H.B. 214 Employer Verification Amendments

Pending in the House Business, Labor and Commerce Committee

Primary bill sponsor is Rep. Walter

Found at: https://le.utah.gov/Session/2025/bills/static/HB0214.html

- Expands requirement that employers with **150** or more employees use the federal E-Verify program, to cover employers with **5** of more employees.
- The bill still does not have any teeth—there's no express penalty against employers who do not comply.
- But the bill does add criminal sanctions against individuals who provide false information to employers in connection with the E-Verify process.

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H.B. 172 Unpaid Wage Amendments
HB 186 Wage Payment Amendments

This bills work in tandem to make it easier for an employee to file a lawsuit about unpaid wages and to collect fees and penalties.

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H.B. 172 Unpaid Wage Amendments

Pending in the House.

Primary bill sponsor is Rep. Burton

Found at: https://le.utah.gov/Session/2025/bills/static/HB0172.html

- Under existing law, an employee may sue an employer for unpaid wages, and recover attorney fees, but only after they make a written demand for payment.
- Note: there's no such requirement for a written demand before filing a claim for unpaid wages with the Utah Labor Commission.
- **This bill removes the requirement for a written demand prior to filing a lawsuit to recover wages and attorney fees**

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HB 186 Wage Payment Amendments

Pending in the House.

Primary bill sponsor is Rep. Christofferson

Found at: https://le.utah.gov/Session/2025/bills/static/HB0186.html

- Under existing law, final payment of wages is due within 24 hours of termination.
- If final wages are not paid on time, an employee may make a written demand.
- A daily penalty of unpaid wages starts from the date of the demand until paid, subject to a 60-day cap.
- A lawsuit may be filed to recover the unpaid wages, penalty, and attorney fees.

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HB 186 Wage Payment Amendments

- HB 186 does away with the requirement that an employee make a written demand for unpaid wages.
- If passed, the daily penalty for unpaid wages runs from the date of termination until paid, subject to the same 60-day cap.
- A lawsuit may be filed to recover unpaid wages, the penalty, and attorney fees—with or without a prior written demand.
- Even if wages are paid late (e.g., on a Monday following a Friday termination), a lawsuit could be filed to collect the penalty and attorney fees.

What's on the horizon?

Interesting Bill Requests

Bill Requests

Track	Short Title	Sponsor	Status
☐	Employee Scheduling Amendments	Blouin, N.	In Process
☐	Portable Benefit Plan Amendments	Johnson, J.	In Process
☐	Post-employment Restrictions Revisions	Chevrier, K.	In Process
☐	Worker Protection Modifications	Clancy, T.	In Process

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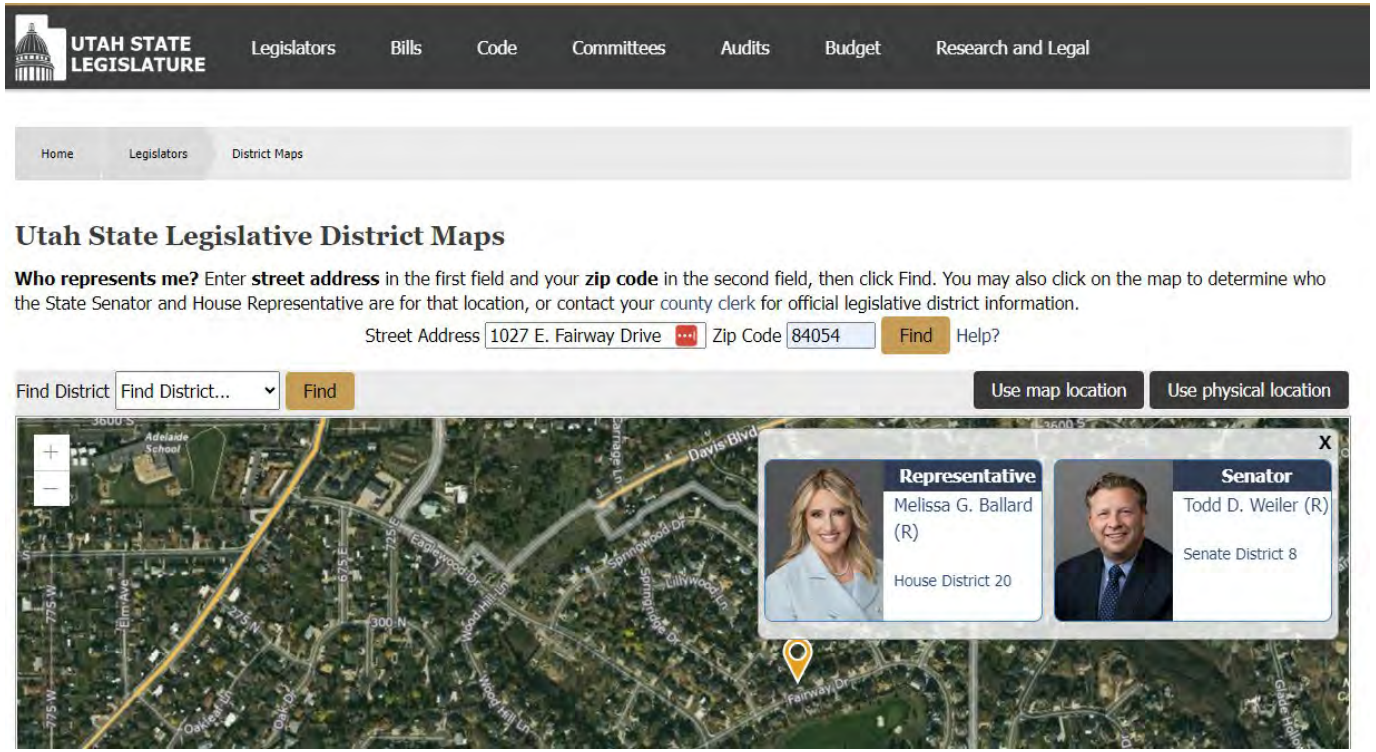
Have your voice heard!

Find your representative at https://le.utah.gov/GIS/findDistrict.jsp



Case Study: Liability for harassment that takes place online, outside work and after hours

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Michael Judd

Mini Workshop:

How do I “balance interests” in the workplace?

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What is a workshop? What is balancing? What is a balancing workshop?

When should I balance?

What should I be balance?

How do I balance safely?

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Question 1: *When* do we balance?

***Cline v. Clinical Perfusion Systems*, 92 F.4th 926 (10th Cir. 2024)**

Cline was a “perfusionist”—a member of a cardiovascular team who found himself in dire need of medical care himself.

Cline lost consciousness while stopped at a traffic light and the medical episode was so severe that at one point his wife was invited to sign a “Do Not Resuscitate” form. (She declined. 😍😍😍)

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Cline v. Clinical Perfusion Systems (10th Cir. 2024)

Cline was in rough shape. He was hospitalized for more than a month and spent another month at a rehab center. He was initially expected to miss work for six months or more.

The day he was set to be transferred from the hospital to the rehab center, his employer called him . . .

. . . to terminate him.

Cline v. Clinical Perfusion Systems (10th Cir. 2024)

BUT:

There's no need to balance here, because the accommodation that Cline sought is not reasonable.

At least not in the Tenth Circuit.

(Then-)Judge Gorsuch in 2014:

"After all, reasonable accommodations—typically things like adding ramps or allowing more flexible working hours—are all about enabling employees to work, not to not work."

***Hwang v. KSU*, 753 F.3d 1159 (10th Cir. 2014)**

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Question 1: *When* do we balance?

Takeaways

- "Undue hardship" balancing comes *after* a reasonable-accommodation analysis—and the test isn't employer friendly
- In certain cases, a requested accommodation may simply not qualify as reasonable, stopping the analysis there
- Don't lose track of state-by-state variations in governing law

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Question 2: What do I put on the scales?

***England Logistics v. Kelle's Transport Serv.*, 2024 UT App 137, 559 P.3d 45**

***Vendr v. Tropic Techs.*, No. 2:23-cv-165, 2023 WL 3851838 (D. Utah June 6, 2023)**

England Logistics. A competitor hired away a handful of executives and England Logistics sued to immediately halt the move.

Vendr. A competitor hired away a young SaaS sales executive and Vendr sued to immediately halt the move.

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England (Utah Ct. App. 2024) / *Vendr* (D. Utah 2023)

England Logistics. "The reasonableness of the restraints in a restrictive covenant is determined on a case-by-case basis, taking into account the particular facts and circumstances surrounding the case and the subject covenant.

. . .

"[G]iven the nature of this company and its wide-ranging operations, the geographic restrictions were reasonable."

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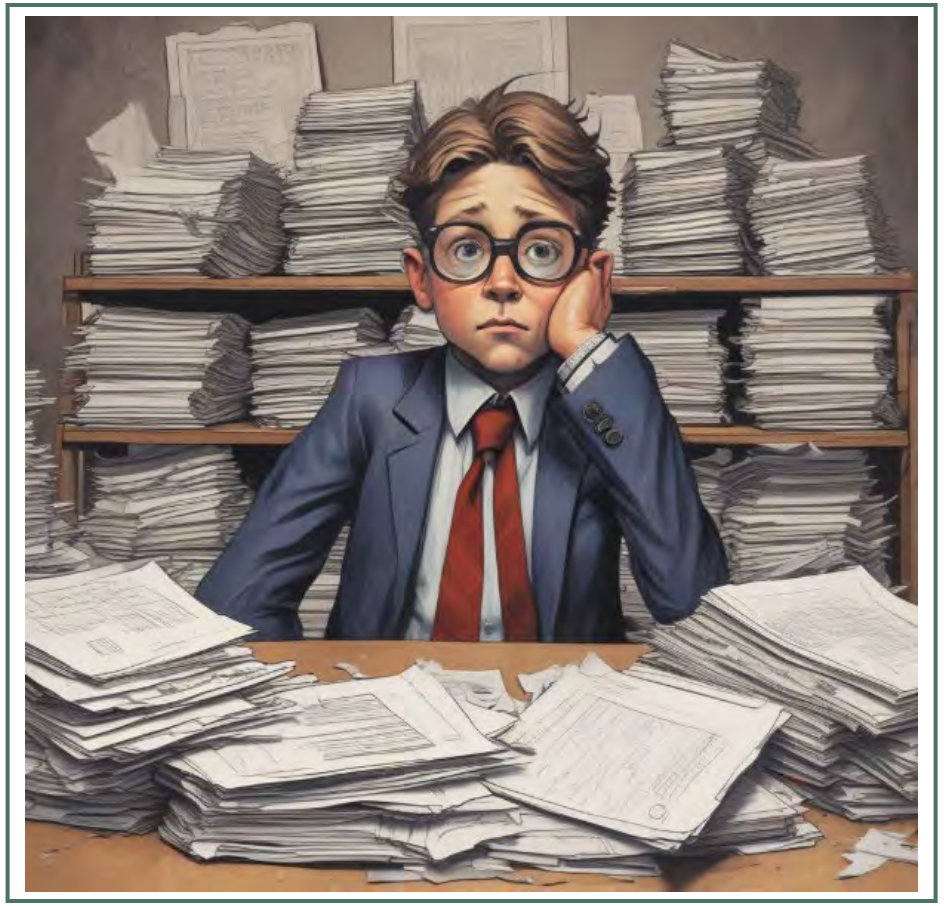
England (Utah Ct. App. 2024) / *Vendr* (D. Utah 2023)



Vendr. "Utah law does not permit an employer to restrict a conventional employee through a noncompete agreement." . . .

"Sanders held a junior position during his employment with Vendr. As one of forty buyers, Sanders does not appear to have a unique position. . . . Vendr, however, requires all its employees to sign noncompete agreements. . . . .Such a practice appears to be against Utah law.

Question 2: *What* do I put on the scales?

Takeaways

- As *England* reflects, Utah courts remain willing to enforce even broad non-competes
- But that analysis is intensely fact-specific, and if an employer wants quick relief, evidence needs to be gathered almost immediately
- Factors to consider: employee seniority, scope of prohibition, scope (both time and geography), definition of competitor, access to confidential company information

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Question 3: How do I balance to survive a lawsuit?

***Hebrew v. Tex. Dep't of Crim. Justice,* 80 F.4th 717 (5th Cir. 2023)**

Hebrew "is a devout follower of the Hebrew Nation religion" and "has taken a Nazarite vow to keep his hair and beard long"

Hebrew's grooming request functions as a request for religious accommodation

The Department placed Hebrew on unpaid leave during training, saying that beards are prohibited for safety reasons (gas-mask adhesion, vulnerability during fights, searches contraband) and general policy

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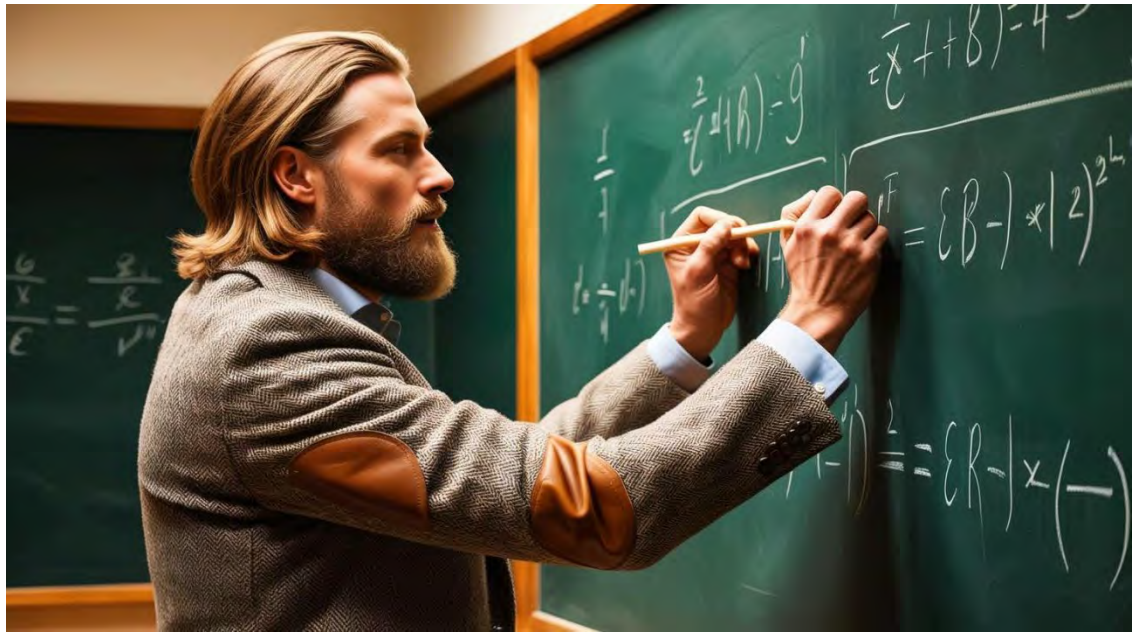
Hebrew v. Tex. Dep't of Criminal Justice (5th Cir. 2023)

The Department won at the district court: coworkers would have to "perform extra work to accommodate"

That conclusion was reversed (quite emphatically) on appeal

The Department needed to show "substantial additional costs or substantial expenditures"



But it had shown no evidence of "cost in context" and no evidence rebutting counterexamples (shorter beards, female guards), and it had relied (wrongly) on the "neutrality" of its grooming standards

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Question 3: *How* do I balance?

Takeaways

- Winning on a balancing-test argument takes *work*, in the form of carefully gathered evidence
- Coworker impacts are "off the table"
- Employer must lead: "reasonably accommodate," not merely "assess the reasonableness of a particular possible accommodation"
- Evaluating "if *everyone* received an accommodation cannot show that [an employer] faces an undue hardship if it grants *one* accommodation"

Coda: One more shot at balancing

***Okonowsky v. Garland,* 109 F.4th 1166 (9th Cir. 2024)**

Lindsay Okonowsky worked as a psychologist for a federal prison.

Her coworker (and prison supervisor) Steven Hellman, pictured at the right, posted "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes" on Instagram, where he was followed by more than 100 prison employees—*including the HR Manager*.

Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

The prison's response seemed to be weighing *something* against Okonowsky's right to be free of harassment—including, maybe, other employees' speech rights or rights to privacy about out-of-work conduct.

But the reviewing court held that "even if discriminatory or intimidating conduct occurs wholly offsite, it remains relevant to the extent it affects the employee's working environment."

Coda: One more shot at balancing *Okonowsky v. Garland* (9th Cir. 2024)

The court wasn't done:

> Social Media posts are permanently and infinitely viewable and re-viewable by any person with access to the page or site on which the posts appear. No matter where [Hellman] was or what *he* was doing when he made his posts, [coworkers] who followed the page were free to, and did, view, 'like,' comment, share, screenshot, print, and otherwise engage with or perceive his abusive posts from anywhere. The Instagram page also served as a record of which co-workers subscribed to the page and commented on posts, showed their comments and their 'likes,' and could be seen at any time or at any place—including from the workplace.

Deciding to "balance" here was a horrible idea.

Coda: One more shot at balancing

Final Takeaways

- "Document, document, document" is always a good practice—and some legal positions require more thorough documentation
- Work closely with legal counsel: some cases don't require balancing (think *Cline*), but others do (think *Hebrew*)
- Some balancing tests are employer-friendly (non-competes) while others are employee-friendly (ADA, PWFA, religious accommodation)
- Oh, and just because conduct occurs offsite does not mean it cannot be the basis for a harassment claim

EEOC Updates

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Elena T. Vetter

Pregnant Workers Fairness Act

On **April 15, 2024**, the EEOC issued its final regulations on PWFA enforcement.

On **December 18, 2024**, the EEOC issued guidance to healthcare providers regarding the documentation employers may seek to support requests for accommodation.

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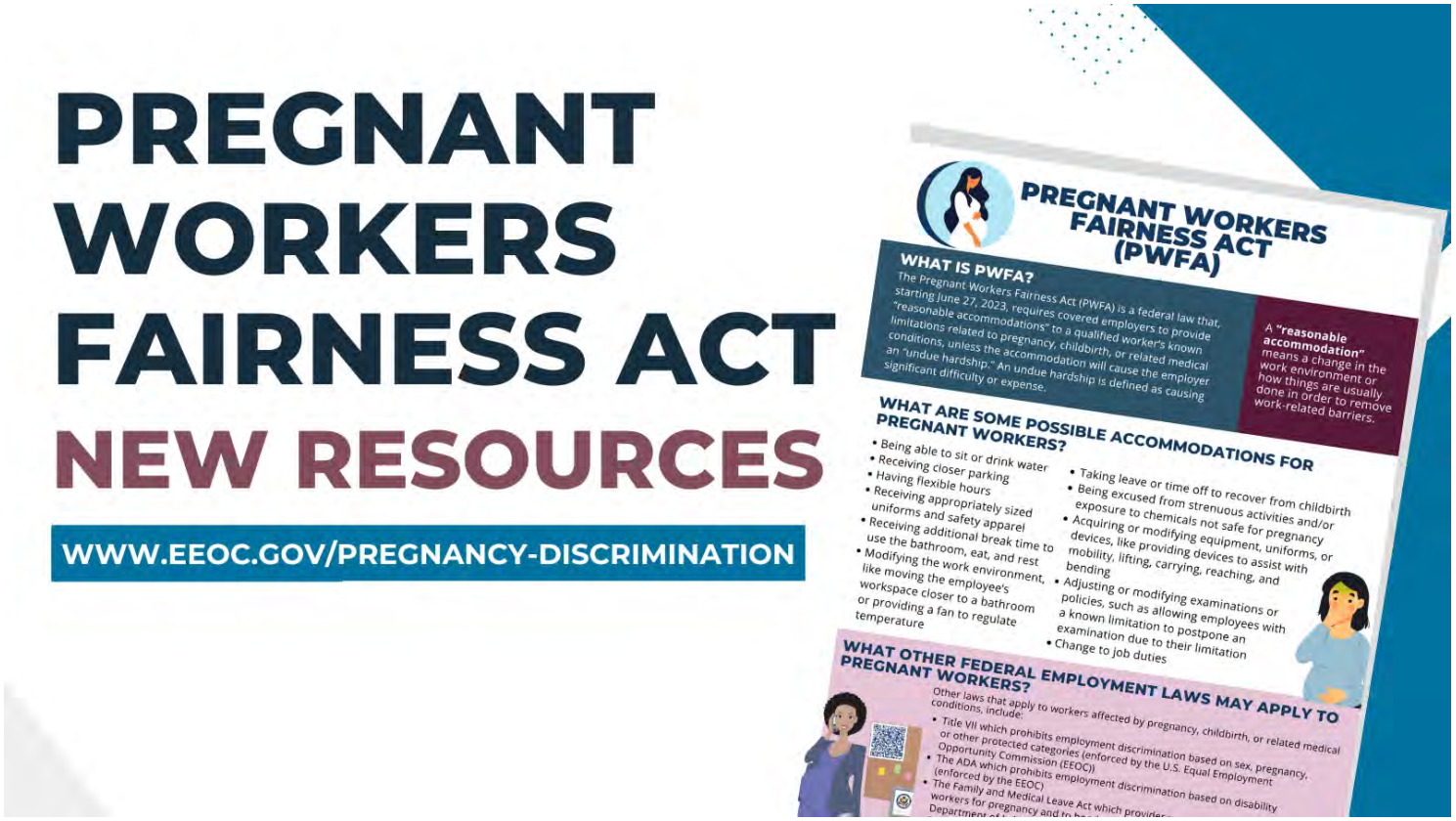
PWFA

The PWFA requires employers with at least 15 employees to provide reasonable accommodations for pregnant applicants and employees that are needed for pregnancy, childbirth, and related medical conditions.



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PWFA and Accommodations

Four accommodations should be granted in almost every circumstance:

- (1) keeping water near and drinking as needed;
- (2) extra time for bathroom breaks;
- (3) to sit or stand as needed; and
- (4) extra breaks to eat and drink as needed.

Employers are ***NOT*** allowed to get health care provider confirmation that an employee needs these four accommodations.

New EEOC Guidance on PWFA

If employers request supporting documentation, the guidance states healthcare providers should:

- explain the healthcare provider's qualifications;
- confirm the employee's physical or mental condition;
- confirm that the condition is related to pregnancy, childbirth, or related medical conditions; and
- describe the needed adjustment or change at work, including the expected duration.

New EEOC Guidance on PWFA

Providers may also give additional information or clarification, such as a view on whether a proposed "alternative accommodation would be effective."

Two more points, keyed to employee privacy:

"Generally, employers cannot require a specific form be used for the supporting documentation for a PWFA accommodation, especially one that asks for unnecessary information."

"You should not simply provide your patient's medical records, because they will likely contain information that is unnecessary for the employer to have."

Last year, the EEOC published new harassment guidance . . .

- Among other things, that guidance extended the protections of EEO laws to repeatedly misgendering individuals, outing individuals, and restricting use to bathrooms or other sex-segregated facilities based on gender identity.
- Now, it comes with a warning:

> "When issuing certain documents, the Commission acts by majority vote. Based on her existing authority, the Acting Chair cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order."

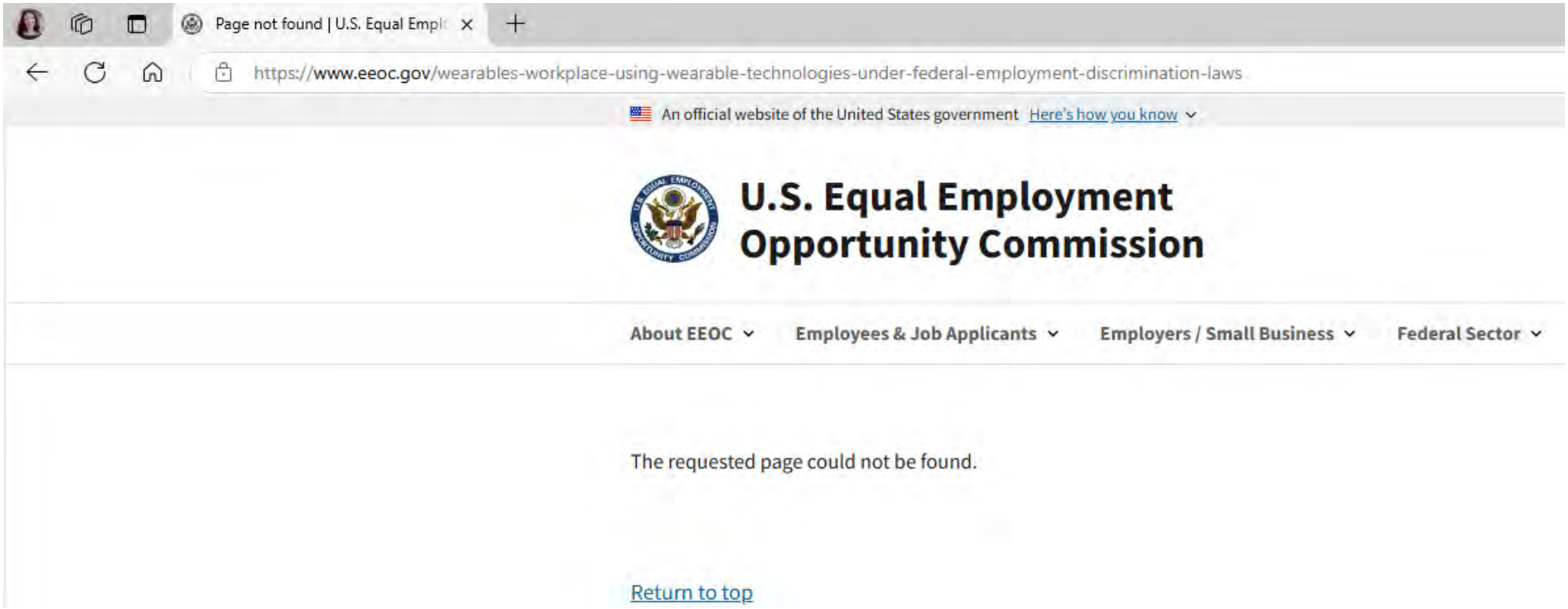
And:

Discrimination claims that might conflict with Trump's executive orders, including one executive order declaring that "sexes are not changeable," will now sent to the EEOC for review, rather than follow the normal investigatory process.

A statement released by the EEOC explains: "acting Chair Lucas has directed that all charges that implicate these executive orders be elevated for review at EEOC headquarters to determine how to comply with these executive orders prior to the recission or revision of the harassment guidance," and "to the extent that a charging party requests a notice of right to sue for one of those charges, EEOC will issue that notice of right to sue, as statutorily required."

Last year, the EEOC published wearable tech guidance . . .

- It's now been scrubbed from the website.



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Andrea R. Lucas, Acting Chair of the EEOC

"I look forward to restoring evenhanded enforcement of employment civil rights laws for all Americans. . . ."

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What does that mean?

“Consistent with the President’s Executive Orders and priorities, my priorities will include rooting out unlawful DEI-motivated race and sex discrimination; protecting American workers from anti-American national origin discrimination; defending the biological and binary reality of sex and related rights, including women’s rights to single sex spaces at work; protecting workers from religious bias and harassment, including antisemitism; and remedying other areas of recent under-enforcement.”

How did Commissioner Lucas vote on the PWFA Final Rule?

Andrea Lucas' Post

Andrea Lucas
Acting Chair, United States Equal Employment Opportunity Commission (EEOC)
9mo

Today, the EEOC issued its final rule implementing the Pregnant Workers Fairness Act (PWFA). I voted to disapprove the final rule. My full, sixteen-page statement addressing my vote is attached to this post. The statement can be downloaded from this post for further review.

In short: I support elements of the final rule. However, I was unable to approve it because it purports to broaden the scope of the statute in ways that, in my view, cannot reasonably be reconciled with the text. At a high level, the rule fundamentally errs in conflating pregnancy and childbirth accommodation with accommodation of the female sex, that is, female biology and reproduction. The Commission extends the new accommodation requirements to reach virtually every condition, circumstance, or procedure that relates to any aspect of the female reproductive system. And the results are paradoxical. Worse, the Commission chose not to structure the final rule in a manner that realistically allows for severability of its objectionable provisions from its reasonable and rational components.

The PWFA was a tremendous, bipartisan legislative achievement. Pregnant women in the workplace deserve regulations that implement the Act's provisions in a clear and reliable way. It is unfortunate that the elements of the final rule serving this purpose are inextricably tied to a needlessly expansive foundation that does not. I cannot support the Commission's final product.

#LegalUpdate #EEOC #HR #Law #Pregnancy #Accomodation #EEO #PWFA

How did Commissioner Lucas vote on the harassment guidance?

No!

No!

Andrea Lucas' Post

Andrea Lucas
Acting Chair, United States Equal Employment Opportunity Commission (EEOC)
8mo

Today, the EEOC issued its Enforcement Guidance on Harassment in the Workplace, available here: https://lnkd.in/eaiR9Axp. I voted to disapprove the final guidance, for reasons including the guidance's assault on women's sex-based privacy and safety rights at work, as well as on speech and belief rights. My statement addressing my vote is attached to this post. The statement can be downloaded from this post for further review.

#LegalUpdate #EEOC #HR #Law #EEO #MeToo #Harassment #SexMatters

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What else has happened?

- The EEOC is composed of five commissioners who are appointed by the president for staggered five-year terms.
  - That structure is meant to protect agency independence, but . . .
- When Trump first took office the EEOC had three Democratic commissioners, one Republican commissioner, and a vacancy he could fill.
- Trump then fired two of the Democratic EEOC members before their terms expired. These removals are illegal and likely to be challenged in court.
- The EEOC now has no quorum, and it's unclear how it will function.

What will the EEOC do next?

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Supreme Court Update

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Christina M. Jepson

Adverse Action

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Adverse Action Backdrop

In a 1999 case, Boone v. Goldin, Vernet Boone, a black woman working at NASA, was reassigned to work in a wind tunnel

Boone sued, arguing that her reassignment to a more stressful job constituted discrimination

A federal appeals court disagreed, ruling that Title VII discrimination claims require an "**adverse employment action**" that is **significant**, *e.g.*, **discharge, demotion, changes that impact pay, promotional opportunities, etc.**

Mere reassignment, even to a wind tunnel, didn't qualify

"Significant" or **"material"** adverse action has been the standard for job reassignment cases for the last twenty-five years, until 2024

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On April 17, 2024, the Supreme Court issued a decision in *Muldrow v. City of St. Louis*

The case creates a new standard for determining when job reassignment is an adverse employment action - expanding employee protections in reassignment cases and possibly beyond

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Muldrow v. City of St. Louis, 601 U.S. 346 (2024)

Jatonya Muldrow alleged that the St. Louis Police Department transferred her to a less desirable role because of her gender

Lower courts ruled against Muldrow, finding her reassignment was not materially adverse because her pay and rank were unchanged

The Supreme Court reversed holding that Muldrow didn't need to show a "significant employment disadvantage" to sustain a Title VII claim—she only needed to show "**some harm from a forced transfer**"

Why would the current SC rule this way?

Muldrow v. City of St. Louis, 601 U.S. 346 (2024)

Takeaways

- Easier to file discrimination cases
- "Some harm" is all that is required for a transfer to be deemed adverse, which can be shown through evidence of diminished responsibilities, perks, and schedule
- "Some harm" now likely is the standard for other types of discrimination and retaliation claims too, *e.g.,* discipline and counseling
- Retaliation claims already are the most frequently filed EEO claim--that's only going to increase
- Be proactive—train your supervisors to document legitimate non-discriminatory, non-retaliatory business motivations for all their employment decisions, including transfers

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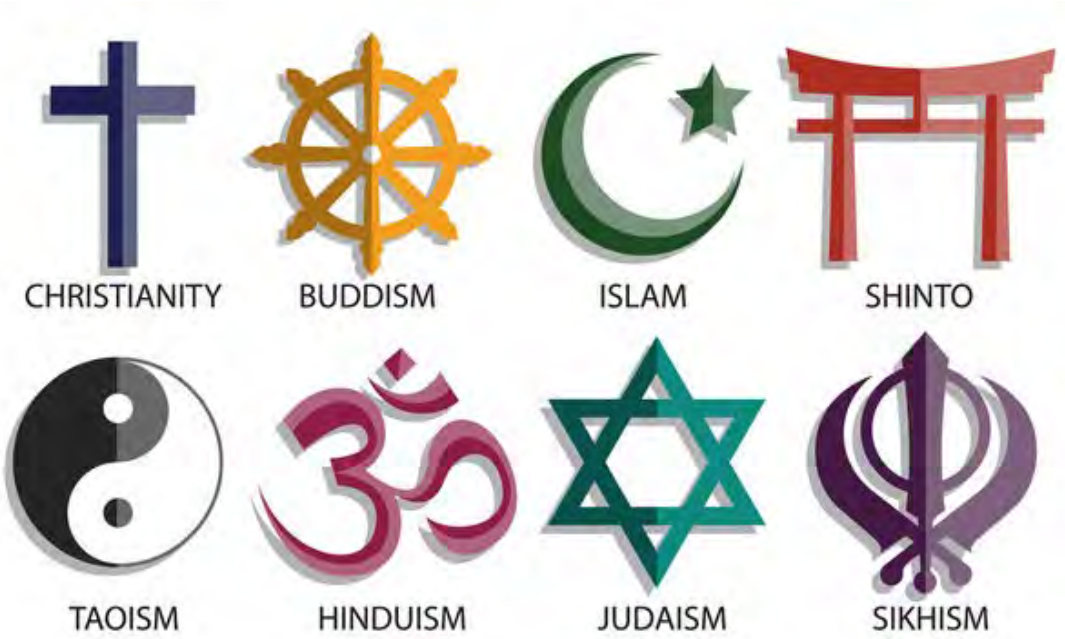

Religious Accommodation

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Groff v. Dejoy, 600 U.S. 447 (2023)

Prior to 2023, courts held that a religious accommodation was an "**undue hardship**" if it would require an employer to bear more than a "***de minimis* cost**"

In June 2023, the Supreme Court issued a decision in *Groff v. Dejoy* changing this standard

The Supreme Court held that a religious accommodation would constitute an "undue hardship" if it "would result in **substantial increased costs** in relation to the conduct of a particular business"

Why would the current SC rule this way?

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Groff v. Dejoy, 600 U.S. 447 (2023)

In applying this test, courts must "**take into account all relevant factors in the case at hand**, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer"

In addition, the court explained that: "Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business . . .. Further, a hardship that is attributable to employee animosity to a particular religion, to religion in general, or to the very notion of accommodating religious practice, cannot be considered "undue."

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- Brownsburg Community School Corporation's ("BCSC") policy allowed students to change their preferred name, pronoun, and gender marker in the school's database if the student requested the change and provided a letter from a parent and a letter from a health care provider
- Teachers were required to call students by the preferred name listed in the school's database
- John Kluge, an orchestra teacher, opposed the policy on religious grounds and requested that as an accommodation he be allowed to call all students by their last name only

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- The School initially granted the accommodation but later revoked it after determining that the proposed accommodation harmed transgender students and was disruptive to other students and teachers
- Kluge filed suit alleging religious discrimination
- The District Court for the Southern District of Indiana granted summary judgement in favor of the School finding that the accommodation was an undue hardship because it imposed more than a "de minimis cost" and the Seventh Circuit affirmed

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- Following the Seventh Circuit's decision, the Supreme Court issued its decision in *Groff v. Dejoy*
- The Seventh Circuit remanded the Kluge case back to the district court to evaluate it under the standard set forth in

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- On remand, the district court once again granted summary judgment in favor of the School
- The court explained that as a public school, the purpose of the school "is **providing a supportive environment for students** and respecting the legitimate expectations of their parents and medical providers" and that this "**mission can legitimately extend to fostering a safe, inclusive learning environment for all students and evaluating whether that mission is threatened by substantial student harm and the potential for liability**"

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Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- The court found that the accommodation caused "emotional harm" to transgender students and "disrupted the learning environment" of all students and teachers
- The court explained that even if most students and teachers were not bothered by the accommodation: "BCSC is a public-school corporation and as such has an obligation to meet the needs of *all* of its students, not just a majority of students or the students that were unaware of or unbothered by Mr. Kluge's practice of using last names only"
- The court further noted that even if the only harm to the School's business was emotional harm to transgender students that "[a]s a matter of law, this is sufficient to demonstrate undue hardship, because if BCSC is not able to meet the needs of all of its students, it is incurring substantially increased cost to its mission to provide adequate public education that is equally open to all."

Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

- The court also found that the school suffered an undue hardship from a risk of liability. The court explained that "Title VII does not require an employer to grant a religious accommodation that would place it on the razor's edge or liability" and that "the threat of disrupting litigation may in some circumstances constitute undue hardship."
- In this case, the court acknowledged that there were several examples of Title IX litigation involving transgender students and that "it has become clear that treating transgender students differently than other students invites litigation under a variety of theories beyond Title IX, many of which have been successfully litigated."
- How will the current SC view this case if it takes up this case?

Applying *Groff* - *Kluge v. Brownsburg Community Sch. Corp.*, 732 F.Supp.3d 943 (S.D. Ind. 2024)

Takeaways

1. It is easier for an employee to bring a claim regarding religious accommodations
2. Under *Groff*, the undue hardship must be considered in the context of the employer's business. In this case, it was critical that BCSC was able to define it business as providing a safe and inclusive learning environment for *all* students.
3. If a proposed accommodation risks subjecting an employer to serious and disruptive litigation it can be an undue hardship.
4. New EEOC Chair Andrea Lucas: "my priorities will include . . . Protecting workers from religious bias and harassment"

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Overtime Exemptions – Burden of Proof

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- The Fair Labor Standards Act ("FLSA") generally requires employers to pay workers who work more than 40 hours in a week overtime pay
- The FLSA includes a number of exemptions from overtime pay
- Under the FLSA, an employers bears the burden of showing that an exemption applies

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- EMD is a distributor of international food products that employed "sales representatives to manage inventory and take orders at grocery stores that stock EMD products"
- The sales representatives worked more than 40 hours per week but were not paid overtime because EMD classified them as exempt under the "outside-sales" exemption for an employee who "primarily makes sales and regularly works away from the employer's place of business"
- The sales representative sued EMD alleging EMD violated the FLSA by failing to pay them overtime

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

- The district court found that EMD had "failed to prove by **clear-and-convincing evidence** that the employees qualified as outside salesmen"
- EMD appealed arguing that the district court should have applied the "less stringent preponderance-of-the evidence standard." The Fourth Circuit of Appeals upheld the district court.
- The Supreme Court reversed holding that **a preponderance-of-the-evidence standard applies when an employer seeks to prove that an employee is exempt under the FLSA**

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E.M.D. Sales, Inc. v. Carrera, No. 23-217, 2025 WL 96207 (Jan. 15, 2025)

Takeaways

1. This case may have limited applicability because "[t]he Fourth Circuit [stood] alone in requiring employers to prove the applicability of the [FLSA] exemptions by clear and convincing evidence
2. Nevertheless, the difference in the two evidentiary standards is significant
3. Still need to careful about exemptions

We've Seen This Movie Before

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Sean A. Monson

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ICE Raids

1) Train receptionist to tell ICE that she is calling company lawyer
2) Administrative warrant
   - Does not allow searches
   - Signed by ALJ or government official
   - Usually issued in association with an I-9 audit
3) Judicial warrant
   - Allows searches
   - Check to make sure signed by judge
   - Allows search to be made at a particular time – check to make sure raid is compliant

ICE Raids

4) Can only search areas that is allows for in warrant
5) Can’t tell your employees to leave
6) Employees are not required to answer questions
7) Employees can hire their own lawyer
8) If employees are detained, have someone contact next of kin and deliver paycheck
9) I-9 self audit? E-verify?
10) MAKE A PLAN!!!

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The EEOC Changes Its Aim

- Trump has named a new Chair of the Equal Employment Opportunity Commission (EEOC), Andrea Lucas. Lucas has expressed her view of the mission of the EEOC stating that her priorities include:
  - “rooting out unlawful DEI-motivated race and sex discrimination”;
  - “protecting American workers from anti-American national origin discrimination”;
  - “defending the biological and binary reality of sex and related rights, including women's rights to single sex spaces at work”; and
  - “protecting workers from religious bias and harassment, including antisemitism.”

Whither DEI?

- Trump issued an executive order titled “Ending Illegal Discrimination and Restoring Merit Based Opportunity. Ending Illegal Discrimination And Restoring Merit-Based Opportunity – The White House.
- The order ends federal affirmative action programs designed to ensure equal employment opportunities for women and minorities.
- However, the executive order does not apply to employment and contracting preferences for veterans.
- In particular, Trump revoked the executive order (dating back to the 1960s) which requires government contractors to establish placement goals for women and minorities if they are underrepresented in the workforce.
- Contractors are now (under Trump) required to certify that they are not carrying out illegal "DEI initiatives."
- DEI is a very broad umbrella which includes some programs now be viewed as "illegal" by the new administration.
- Consult an employment attorney regarding what is legal and not legal.

DEI Private Employers

- These executive orders only apply to the federal government and federal contractors.
- However, while the orders do not apply to private-sector employment, the second order includes a section titled “Encouraging the Private Sector to End Illegal DEI Discrimination and Preferences” which instructs federal agencies to identify up to nine potential civil compliance investigations related to DEI of publicly traded corporations, large non-profits, foundations with assets of $500 million or more, state and local bar and medical associations, and institutions of higher education with endowments over $1 billion.
- Some companies have remained firm in supporting their DEI programs including Costco, Apple, Pinterest, Delta Airlines, Patogonia, and Microsoft.
- Many other companies have abandoned their DEI programs.
- If you intend to maintain your DEI program, call your lawyer to review.
- Reverse discrimination claims are coming.

Pronouns and Bathrooms

- Trump has issued an executive order titled "Defending Women From Gender Ideology Extremism and Restoring Biological Truth to the Federal Government."
- The order mandates the federal government to recognize two “biological sexes” as determined “at conception.” Among other things, the order requires the EEOC and DOL to prioritize litigation related to these issues.
- The executive order conflicts with existing EEOC guidance and Supreme Court precedent.

Bathrooms and Pronouns

- **First**, EEOC workplace harassment guidance provides anti-harassment protections for LGBTQ employees including a statement that intentionally misgendering an employee can be harassment and that employers have to let employees use the bathroom aligning with their identity.
- However, because Trump fired two commissioners at the EEOC before their terms were set to end, there is no quorum at the EEOC. The Trump administration wants to end the guidance but can't yet because there is no quorum.
- The EEOC guidance remains on the EEOC website but with this statement: "When issuing certain documents, the Commission acts by majority vote. Based on her existing authority, the Acting Chair cannot unilaterally remove or modify certain 'gender identity'-related documents subject to the President's directives in the executive order."

Bathrooms and Pronouns

- **Second**, the executive order potentially conflicts with the Supreme Court's decision in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).
- In *Bostock*, the Supreme Court held in a 6-3 decision that Title VII protects employees from discrimination based on sexuality or gender identity.
- The executive order seeks to limit Bostock, stating that: "The prior Administration argued that the Supreme Court's decision in *Bostock v. Clayton County* (2020), which addressed Title VII of the Civil Rights Act of 1964, requires gender identity-based access to single-sex spaces under, for example, Title IX of the Educational Amendments Act. This position is legally untenable and has harmed women. The Attorney General shall therefore immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent."

Bathrooms

- When EEOC guidance was initial passes, Andrea Lucus said, while voting against the guidance, “Every female worker has privacy and safety rights that necessitate access to single-sex workplace bathrooms limited to biological women.”
- Whether an employer should abide by the existing guidance is unclear. (It is ultimately going to go away, I believe; its just a matter of time).
- Moreover, it is unclear whether EEOC guidance has any value regardless of what it says. Last year, the Supreme Court overruled Chevron deference toward agency interpretations. *Loper Bright v. Ramondo*, 603 U.S. 369 (2024).
- This means that any agency’s interpretation about the laws it enforces (such as the EEOC and anti-discrimination laws), no longer has to be given deference by a court.

Bathrooms

- If this issue were to come before the Supreme Court again, it could very well be reversed by the current Supreme Court which has not shown much deference to precedent.
- Employers can expect litigation around these issues.

Utah Legislature Shows the Way?

- 34A-5-110. Application to sex-specific facilities.
- This chapter may not be interpreted to prohibit an employer from adopting reasonable rules and policies that designate sex-specific facilities, including restrooms, shower facilities, and dressing facilities, provided that the employer's rules and policies adopted under this section afford reasonable accommodations based on gender identity to all employees.

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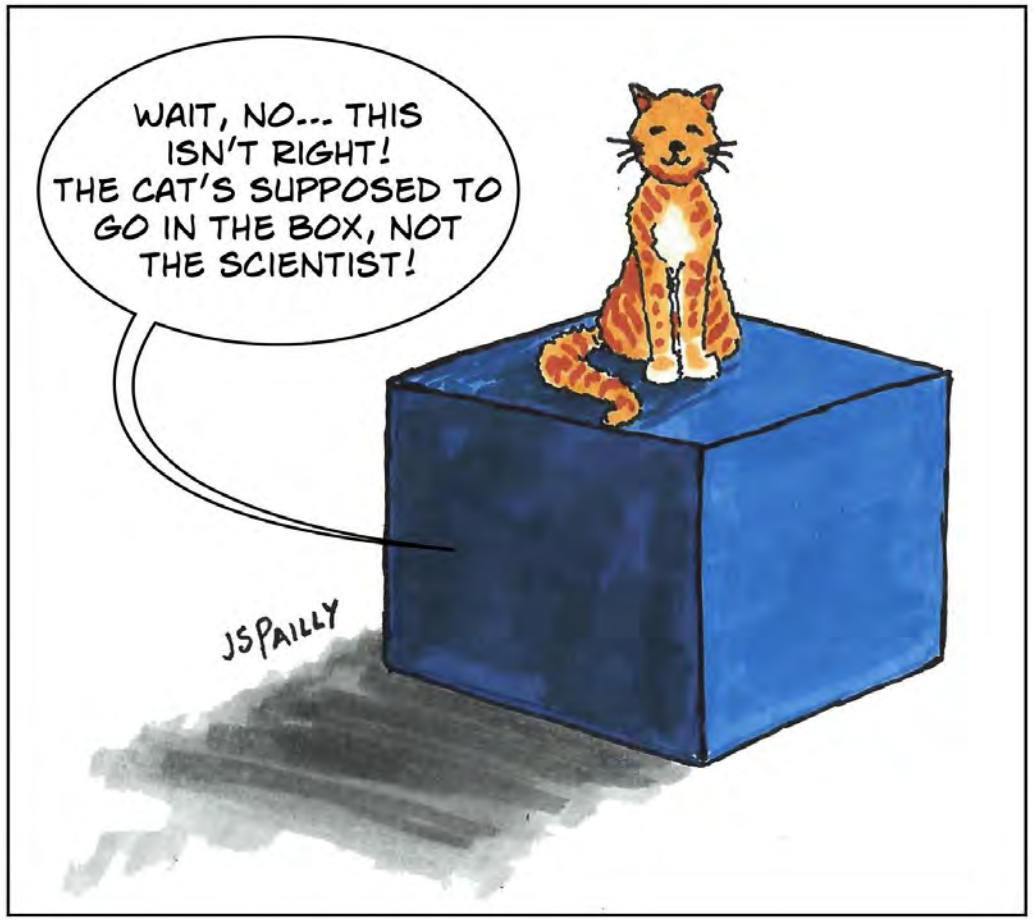
Utah Legislature Shows the Way?

- If, in the future, federal government says no longer required to let employees use bathroom of choice. (Extremely likely).
- Utah Code “reasonable accommodation” may be the pathway to take.
- But, regardless of what the Trump EEOC says, a federal could say under *Bostock* that employers are required to do so, despite state law.

Schrodinger's Cat (or Legal Advice)



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Pronouns

- Another issue is religion and gender identity.
- The EEOC's current harassment guidance, discussed in the previous slide, states that employers did not need to grant religious accommodations if the accommodations would create a hostile environment for other employees.
- For instance, employers did not have to grant an accommodation to allow an employee to deliberately misgender people because of their religious beliefs.
- But, as noted in the earlier slide, that guidance is in limbo.

Pronouns

- Further, as you know, the Utah legislature passed a law in 2024 giving employees free speech rights in the workplace including the right to not engage in “religiously objectionable expression.” This was passed to allow employees to misgender other employees when using certain pronouns is religiously objectionable to that employee.
- For employers there will be no easy answers. Whether the employer sides with the employee with the religious accommodation request or the LGBTQ employee, there is a risk that the employer may be sued.
- Call your lawyer. (My prediction is that most employers will end up deciding to comply with state law because the current EEOC guidance stating that intentional misgendering is unlawful is going to disappear).
- But, again, Bostock.

Runners Up

- AI Guidance in limbo (Making sure AI screening does not have disparate impact on protected classes)
- PWFA recent guidance likely to be withdrawn
  - Lucas voted against the guidance at the time because it would “broaden the statute in ways that, in my view, cannot reasonably be reconciled with the text.”
  - Guidance had a very broad definition of “pregnancy” – likely target will be instructions/guidance that women who have abortions have rights under the PWFA.

The Rise of Reverse Discrimination Claims

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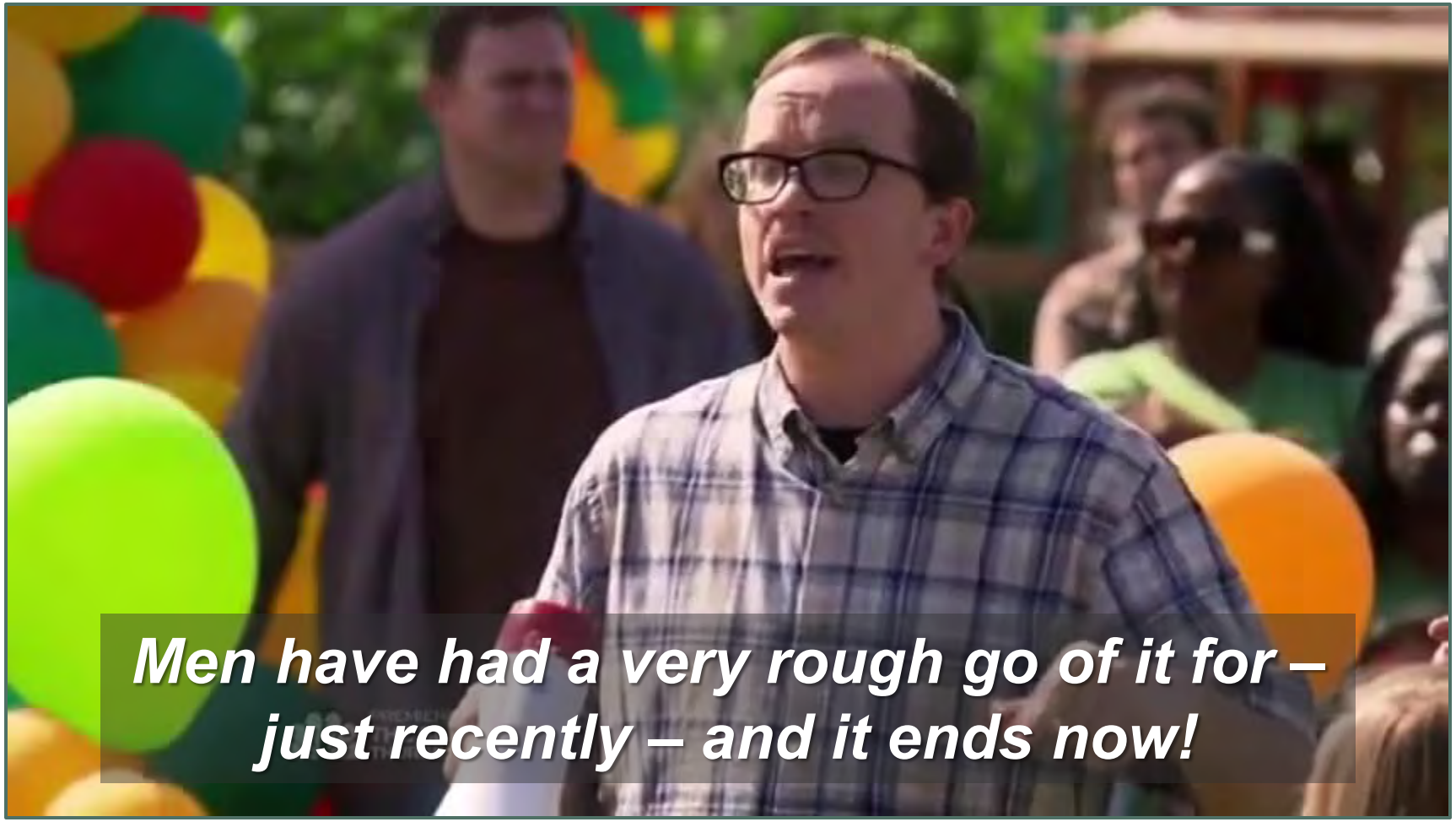
Paul R. Smith

The Rise of “Reverse Discrimination” Claims



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Standard for Title VII Discrimination Claims

- Direct Evidence of discrimination
  - Statements (e.g., from a manager)
  - Policies
- Circumstantial evidence of discrimination
  - Burden-shifting framework (*McDonnell Douglas*)

Circumstantial Evidence—Burden Shifting

- Plaintiff's Burden
  - Person was a member of a protected class
  - Person was qualified for position
  - Person suffered an adverse employment action
  - After rejection, position remained open, and the employer continued to seek applicants of plaintiff's qualifications
- Employer's Burden
  - Articulate a legitimate, nondiscriminatory reason for employee's rejection
- Back to Plaintiff's Burden
  - Show employer's reason is pretextual

Reverse Discrimination—Two Approaches

- **The Majority**
  - The test stays the same
  - Circuits: 1st 2nd **3rd** 4th 5th 9th **11th**
- **The Minority**
  - The first element (plaintiff belongs to a protected class) is modified—Plaintiff must show:
  - "Background circumstances" or
  - "Evidence that there is something 'fishy' going on"— "indirect evidence to support the probability that but for the plaintiff's status he would not have suffered the challenged employment decision"
  - Circuits: D.C. 7th 8th 10th (our circuit)

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Hurlow v. Toyota Motor of North America (N.D. Ill.)

- Darryl Hurlow
  - Joined Toyota in Fall 2016 as an intern
  - May 2016 he was promoted to a District Services & Parts Manager (DSPM) position

What was Hurlow Complaining About?

- Promotions
  - 2017: Toyota promoted a male and a female to management positions
  - 2018: Toyota promoted a female
  - September 2019: Hurlow applied for management position, but Toyota gave the job to a female candidate
  - November 2019: Toyota promoted a male
  - September 2020: Toyota promoted a female
- Other employment benefits
  - Bonuses/ranking
  - Negative feedback
  - Awards: Trip to Aspen, Colorado—it went to a female

TOYOTA

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- Hurlow sued, alleging sex discrimination
- Toyota filed a motion to dismiss (usually hard to win if you're an employer
- The Illinois court used the heightened standard

TOYOTA

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Background Circumstances

- The court listed some examples of what a reverse-discrimination plaintiff could point to:
  - Schemes to fix performance ratings to their detriment
  - Hiring system that seemed rigged against them
- Not enough for Hurlow to say there weren't "objective measures" for the ranking system
- Some quarters, women ranked higher, other quarters men ranked higher
- 4 out of 6 of the promotions went to women (66%) was not enough—court said that wasn't "nearly all" of the open positions
- The decision makers were predominately male
- "The bare fact that a woman got a job that a man wanted to get or keep is insufficient, without more, to raise an inference that an employer is included to discriminate against men."

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Lewick v. Sampler (D. Kan.)

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- Richard Lewick
  - Hired as a Sales Associate in October 2018
  - He quickly moved up the ladder: promoted twice in the next year
  - Was hoping to get promoted again (Store Manager)
  - Instead, Sampler hired a female
  - Lewick felt the woman was less qualified than him
- Lewick sued, alleging sex discrimination
- Sampler filed a motion to dismiss

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- Lewick didn't really point to any evidence of "background circumstances"
- Instead, he said the heightened standard for reverse-discrimination cases wasn't really a thing anymore (citing Bostock)
- The court disagreed
  - "He alleges only that defendant promoted a woman instead of him on just one occasion"
- However, the court pointed to several other recent reverse-discrimination cases where the plaintiffs were able to survive motions to dismiss

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Court pointed to several other recent reverse-discrimination cases where the plaintiffs survived motions to dismiss

- *Seymour v. Tonganoxie*
  - Plaintiff's alleged supervisor excluded him from meetings that similarly situated female employees attended and plaintiff's job duties were reassigned
- *Walker v. Answer Topeka*
  - Plaintiff alleged “several instances of his female coworkers engaging in the same activity that got him fired” without any consequence
- *Mackley v. TW Telecom Holdings, Inc.*
  - Plaintiff was given different work assignments and office hours than his fellow female employees and “even though his performance numbers were superior to similarly situated female employees he was nonetheless terminated”
- *Slyter v. Board of County Commissioners for Anderson County*
  - Plaintiff alleged that “he reported several departmental policy violations by a junior female employee, she was not disciplined for these violations, and he was terminated for violating an unwritten policy
- These are all Kansas cases….

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The US Supreme Court Has Taken Up the Issue

- SCOTUS granted cert. on a case from the 6th Circuit: *Ames v. Ohio Department of Youth Services*
- In *Ames*, the court applied the heightened standard and dismissed the plaintiff's sexual-orientation-discrimination case
  - Plaintiff was a heterosexual woman who, after 30 years of public service, applied for a promotion and was instead demoted, and the promotion was given to a "25-year-old gay man"
- Given the current makeup of the Court, the heightened standard will likely be discarded

Duvall v. Novant Health, Inc.

NOVANT™ HEALTH

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- Jury awarded Duvall $10 million in punitive damages based on his race/sex discrimination claim
- Why the big difference between Duvall's case and Lewick's and Hurlow's?

NOVANT™ HEALTH

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Duvall

- White male
- Hired in 2013 as Novant Health's VP of Marketing and Communications
- Evidence at trial demonstrated that Duvall "performed exceptionally in his role"
  - He received strong performance reviews
  - Received national recognition for himself and the program he developed
- Novant fired Duvall in July 2018
- What happened?

- In 2015 Novant Health hired Tanya Blackmon as Senior VP of Diversity and Inclusion
- Novant tasked Blackmon to develop a “Diversity and Inclusion Strategic Plan” for the company
- The Plan had 3 phases
  - **Phase 1**: Asses Novant’s DEI culture, benchmark its DEI levels, and get the company’s Board to commit to using DEI in decision making
  - **Phase 2**: Set goals to embed diversity and inclusion in 3-5 years, with a commitment to adding additional dimensions of diversity to the executive and senior leadership teams
  - **Phase 3**: Evaluate the progress toward embedding DEI and implement strategies and tactics to close identified gaps

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- In May 2018, Novant's DEI Council met and reviewed DEI data
  - Decline in female leaders from 2015 to 2017
  - 82% of Novant's workforce was female but only 4% female
  - Increase in white male representation
- In July 2018, Novant fired Duvall. Novant replaced him with a white woman and 2 black women.
- In October 2018, the DEI Council met again
  - Discussed their philosophy: "Our team members should reflect our communities. Our leadership should reflect our team members."
  - Discussed quotas and targets
- In February 2019, the DEI Council met again and reviewed a report
  - DEI Plan had seen great success in using qualitative and quantitative data as drivers to track progress
  - Showed that Novant had made progress in increasing Black/African American representation in leadership roles

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- When Duvall's supervisor told him he was being fired, he simply said the company was "going in a different direction"
- No prior indication that his job was in jeopardy

NOVANT™ HEALTH

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- At trial, the supervisor testified that Duvall was fired because he “lacked engagement” and “support from the executive team”
  - He said Duvall “damaged his credibility” when he “froze” and “walked off” the stage while giving a presentation to Novant’s leadership team, and then declined opportunities to speak before the Board
- But it turned out that Duvall was actually sick—a fact that the supervisor knew at the time

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- The supervisor also testified that Duvall missed two management meetings
  - But both absences were the product of known and previously existing scheduling conflicts (one for a presentation at a national conference, and one for a family reunion)
- In December 2018, just a few months after the termination, Duvall's supervisor praised Duvall's performance to a recruiter
  - Supervisor said the reason Duvall was let go was because the company had experienced "a lot of change"—there was a "desire to bring new leaders" and for a "different point of view"
- Four months before Novant fired Duvall, it fired another white male worker and replaced him with a black male employee

NOVANT HEALTH

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- Again, the jury awarded Duvall $10 million in punitive damages
- The *Duvall* court highlighted several things
  - The use of quotas
  - The folks with whom Novant replaced Duvall
  - The supervisor's "shifting, conflicting, and unsubstantiated explanations for Duvall's termination"
    - "[M]erely post hoc rationalizations invented for the purposes of litigation and therefore unworthy of credence"

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Lessons from Duvall

- Don’t use DEI quotas
  - DEI programs should be about expanding the applicant pool (outreach and removing barriers), not about meeting hiring/promotion quotas
- Document performance issues
- When terminating an employee, provide the actual reason—don’t just say “not a good fit” or “going in a different direction”
  - You don’t want it to appear that you’re changing or manufacturing your story once in litigation
- Follow your policies for *everyone*

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KEYNOTE SPEAKER

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Emily M. Dickens, J.D.

Chief of Staff, Head of Government Affairs and Corporate Secretary for SHRM

Registration is Open at SLSHRM.org/Events

Thank you for attending!

SESSION ONE: 10 – 11 AM

Mark Tolman
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SESSION TWO: NOON – 1 PM

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