EMPLOYMENT LAW UPDATE: SEX AND TWEETS GALORE

RECENT ISSUES OF INTEREST TO GOVERNMENTAL EMPLOYERS

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EMPLOYMENT LAW UPDATE: SEX AND TWEETS GALORE

This paper summarizes recent developments in employment law relevant to public employers including the Equal Employment Opportunity Commission's latest priorities; cases and decisions involving unique disability accommodations; cases and decisions involving sexual orientation, transgender, gender stereotyping issues; and cases and decisions involving social media and free speech issues. This paper also includes an update on notable employment law legislation considered and enacted during the 85th Texas Legislative Session, and closes with an update on President Trump's actions that are impacting employers.

I. EEOC'S STRATEGIC ENFORCEMENT PLAN 2017-2021

President Donald Trump has appointed Victoria A. Lipnic to replace current chair Jenny Yang when her term expires in July 2017. The EEOC is led by five commissioners and Lipnic is the only Republican. The EEOC's 2017-2021 stated enforcement priorities are as follows:

1. Eliminating barriers in recruitment and hiring such as:
    - Class-based recruitment and hiring practices that discriminate against protected groups.
    - Exclusionary policies and practices;
    - Channeling and steering of individuals to specific jobs due to their status in a particular group;
    - Job segregation;
    - Restrictive application processes; and
    - Screening tools that disproportionately impact workers based on their protected status.
2. Protecting vulnerable workers, including immigrant and migrant workers, and underserved communities from discrimination.
3. Addressing selected emerging and developing issues including:
    - Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
    - Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and Pregnancy Discrimination Act (PDA);
    - Protecting lesbian, gay men, bisexual, and transgender people from discrimination based on sex;
    - Clarifying the employment relationship and application of workplace civil rights protections in light of increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and on-demand economy; and
    - Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the US and abroad.
4. Ensuring equal pay protections for all workers.
5. Preserving access to the legal system by focusing on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts such as:
    - Overly broad waivers, releases, and mandatory arbitration provisions;
    - Employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and
    - Significant retaliatory practices that effectively dissuade others in the workplace from exercising their rights.
6. Preventing systemic harassment.

In interviews regarding the EEOC's priorities, Lipnic has commented that the EEOC will continue to enforce federal nondiscrimination laws, work on reducing its backlog, and will be looking at whether to recommend bystander intervention training. She also noted that equal pay issues are of particular interest to the Commission, and that, although not mentioned in the strategic enforcement plan, the Commission will likely increase its focus on age discrimination because 2017 is the Age Discrimination in Employment Act's (ADEA) 50th anniversary. The Commission will also adopt President Trump's focus on job growth. In policy making, the EEOC must recognize that certain business practices are necessary for companies to be competitive today.

Lipnic also wants to make some administrative changes. For example, Lipnic wants to work to ensure that the EEOC's pre-suit conciliation program, which has been increasingly challenged by employers, is effective and that EEOC employees are properly trained in its use. She also wants commissioners to see and vote on more complaints before they are filed in federal court rather than delegating decisions on complaints to the commission's general counsel.

II. RECENT CASES OF NOTE

A. ADAAA Cases of Note

1. *Stevens v. Rite Aid Corporation*, 851 F.3d 224 (2nd Cir. Mar. 21, 2017).

Plaintiff, a pharmacist, was fired for failure to comply with a company policy that required pharmacists to administer immunization injections to customers. The plaintiff sued for disability discrimination in the termination and failure to accommodate his disability, trypanophobia (fear of needles), by requiring him to administer the immunization injections. Following trial, the jury found that Rite Aid violated the ADAAA and awarded the plaintiff $1.7 million in back- and front-pay as well as non-pecuniary damages of $900,000 (the $900,000 was later reduced to $125,000 when the plaintiff agreed to a remittitur).

The Second Circuit reversed the jury's judgment on grounds that (1) performing immunization injections was an essential job requirement, (2) the plaintiff did not present evidence of a reasonable accommodation so he could perform the immunization injections, and (3) therefore, because the plaintiff was not qualified to perform the essential functions of his job, Rite Aid's termination of Plaintiff was lawful. This case demonstrates the importance of updating job descriptions to account for changes to job functions—because Rite Aid diligently updated the pharmacist job description when Rite Aid corporate decided to require pharmacists to perform immunizations, Rite Aid was able to effectively argue that the task was indeed an essential function of the job. Note that it is the employer's burden—not the employee's—to prove what the essential job functions are for ADAAA compliance.

2. *EEOC v. CRST International Inc./CRST Expedited Inc.*, No. 3:17-cv-00241-TJC-JBT (M.D. Fla. Mar. 2, 2017).

On March 2, 2017, the Chicago and Miami EEOC District offices teamed up and filed a charge alleging that CRST International, Inc. ("CRST"), a national trucking company, violated federal law when it refused to hire and retaliated against a job candidate because he required the use of a service dog.

The suit alleges the following facts: Plaintiff, a veteran, applied to be a truck driver with CRST and, after he was admitted to the truck driver training program, he disclosed that he suffered from anxiety and post- traumatic stress disorder that required the use of a trained service dog. The service dog helped to control Plaintiff's anxiety and wake him from nightmares caused by post-traumatic stress disorder. Despite successfully completing the training program, Plaintiff was not permitted to advance to orientation and additional on-the road programs and CRST did not hire him. CRST advised Plaintiff that he could not advance in the hiring process, which included an on-the-road program, because the on-the-road program required overnights away from home and CRST had a policy that prohibited pets.

The EEOC's suit also alleges that, around the same time that CRST denied the plaintiff's request for accommodation, CRST developed a new "Service Dog Process" to address accommodation requests seeking the use of a service dog, but the plaintiff was not given the opportunity to qualify for accommodation under the new policy.

The lawsuit asks CRST to hire Plaintiff, and seeks back pay, front pay, and compensatory and punitive damages, along with a permanent injunction enjoining CRST from: (i) failing to provide a reasonable accommodation for disability, (ii) failing to hire an applicant due to disability, (iii) retaliating against an applicant seeking a reasonable accommodation, and (iv) interfering with applicants' rights under the ADAAA. The case is still pending in the U.S. District Court for the Middle District of Florida.

3. *EEOC v. PJ Utah LLC, PJ Cheese, Inc., PJ United, Inc.*, No. 2:14-cv-00695-TC (D. Utah – settlement announced Jan. 26, 2017).

On January 26, 2017, it was announced that the EEOC settled a case it had previously filed against Papa John's Pizza in 2014. The suit alleged that Papa John's Pizza discriminated against an employee who had Down's Syndrome. According to the EEOC's suit, the employee was successfully employed at the Company's Farmington, Utah location for more than five months, at which he was permitted to have an independently employed and insured job coach to assist him. After an operating partner visited the Farmington location and observed the employee working with the assistance of his job coach, the operating partner ordered local management to fire the employee.

The EEOC took the position that, in appropriate circumstances, such as those in this lawsuit, the use of a job coach is a reasonable accommodation under the ADAAA. Under a consent decree settling the suit, Papa John's will pay $125,000 to the employee, review its equal employment opportunity policies, conduct training for management and human resources employees for its Utah locations, and establish a new

recruitment program for individuals with disabilities in Utah.

4. *EEOC v. Pioneer Health Services, Inc.*, No. 1:17-cv-00016-GHD-DAS (N.D. Mississippi Feb. 3, 2017).

On February 3, 2017, the EEOC sued Pioneer Health Services Inc., a Mississippi company focused on rural health care alleging that Pioneer unlawfully discriminated against a social worker/therapist because of her disability by refusing to provide her with an accommodation, firing her, and then retaliating against her by refusing to re-hire her after she complained.

The Complaint alleges that the employee became ill from liver failure and was hospitalized in July 2012. During that same month, she sought, and Pioneer approved, her request for leave to cover her absence while she underwent a liver transplant. After a successful liver transplant, she was supposed to return to work on September 2, 2012. Prior to that return date, she requested four more weeks of leave to allow for her recovery from post-operative complications. Even though she had more than four weeks of available sick leave, Pioneer denied her request. After the company-approved leave was exhausted, Pioneer fired her. Then, after receiving notice that she filed a discrimination charge with the EEOC, Pioneer would not re-hire her for an available social worker position.

The EEOC's suit seeks monetary damages, including back pay, compensatory and punitive damages, and injunctive relief. This case is still pending in the Northern District of Mississippi.

In a press release regarding this case, the EEOC Director emphasized that the ADAAA and FMLA operate independently of one another. Where an employee has exhausted her FMLA leave and requests additional leave, the employer must engage in the interactive process to determine whether additional leave under the ADAAA is warranted.

In the same press release, an EEOC Regional Attorney added that the EEOC will continue to scrutinize instances where an employer terminates its employee with a disability immediately upon expiration of that employee's medical leave. Often, a short extension of leave can be a reasonable accommodation that can allow that employee to return to work.

B. Title VII Sexual Orientation, Transgender, and Gender Stereotyping Cases of Note.

1. *Kimberly Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. Apr. 4, 2017).

Plaintiff Hively, openly lesbian, began employment as an adjunct professor at Ivy Tech Community College in 2000. Between 2009 and 2014 Hively applied for full-time employment but was denied every time, until her contract was not renewed in 2014. Believing she was discriminated against based on her sexual orientation, Plaintiff filed a charge with the EEOC, and after receiving her right-to-sue letter, filed her discrimination suit in district court. The district court granted summary judgment in favor of the college for Plaintiff's failure to state a claim under Title VII.

On appeal the Seventh Circuit framed the issue as a "pure question of statutory interpretation." The court tasked itself with answering the question, what does it mean to discriminate on the basis of sex? The court refused to perform an analysis of the "notoriously malleable" realm of legislative intent because it can lead to unreliable inferences. Instead, the court looked to the U.S. Supreme Court decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79-80, 118 (1998), which stated that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." The Seventh Circuit relied on this statement to expand Title VII to prohibit discrimination based on sexual orientation. The court reversed and remanded.

2. *Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2d Cir. Mar. 27, 2017).

Christiansen sued his employer under Title VII alleging that he was subjected to various forms of workplace discrimination due to his failure to conform to gender stereotypes and his HIV-positive status. The trial court construed Christiansen's Title VII claim as an impermissible sexual orientation discrimination claim and dismissed it pursuant to *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). On appeal, Christiansen argued that the Second Circuit should reconsider its decision in *Simonton* and hold that Title VII prohibits discrimination on the basis of sexual orientation.

The Second Circuit lacked the authority to reconsider *Simonton*, which is binding precedent. However, the court held that Christiansen's complaint plausibly alleged a gender stereotyping claim cognizable under the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The court therefore reversed the trial court's dismissal of Christiansen's Title VII claim and remanded for further proceedings. The court affirmed dismissal in all other respects.

3. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. Mar. 10, 2017).

Jameka Evans sued her former employer, Georgia Regional Hospital, alleging discrimination based on sexual orientation and gender non-conformity, and retaliation from her complaints filed with HR. Her complaint was dismissed *sua sponte* at the trial level for failure to state a claim.

On appeal, the Eleventh Circuit affirmed dismissal of the sexual orientation claim based on the precedent set by *Blum v. Gulf Oil Corp*., 597 F.2d 936 (5th Cir. 1979) and vacated Plaintiff's retaliation claim due to her failure to object to the district court's dismissal. The Eleventh Circuit, however, held that a gender non-conformity claim constitutes a "separate, distinct avenue for relief under Title VII." The court remanded the gender non-conformity claim to allow Plaintiff to state a claim in an amended complaint.

4. *Baker v. Aetna Life Insurance Company*, --F.Supp.3d--, 2017 WL 131658 (N.D. Tex. Jan. 13, 2017)

Plaintiff alleged that she suffered from gender dysphoria and brought suit against her employer and the employer's insurance company for refusing to cover the cost of her breast augmentation surgery and denial of short term disability for the surgery. Among other claims, Plaintiff alleged sex and gender discrimination in violation of Title VII. The district court dismissed many of Plaintiff's claims, but denied her employer's motion to dismiss the Title VII claim. Under Title VII an adverse employment action consists of, "hiring firing, demoting, promoting, granting leave, and *compensating*." The court found it plausible that Plaintiff was denied employment benefits based on her sex and gender.

5. *Blatt v. Cabela's Retail, Inc*., 2017 WL 2178123 (E.D. Penn. May 18, 2017).

Blatt, who was diagnosed with gender dysphoria, which substantially limited one or more of her major life activities, alleged that Cabela's discriminated against her, and ultimately terminated her, on the basis of her sex and disability. Blatt alleged that her gender dysphoria substantially limited her ability to interact with others, reproduce, and function both socially and in her occupation. Cabela's sought dismissal of the disability discrimination failure to accommodate and retaliation claims, but the court denied Cabela's motion.

Cabela's contended that the portion of the ADAAA that excludes "gender identity disorders" from ADAAA coverage applied to Blatt's gender dysphoria condition such that it is excluded from the ADAAA's scope. The court disagreed, stating:

> the term gender identity disorders is read narrowly to refer only to the condition of identifying with a different gender, not to encompass and exclude from ADA protection a condition like gender dysphoria which goes beyond merely identifying with a different gender and is characterized by clinically significant stress and other impairments that may be disabling.

The court also held that Blatt established that she engaged in protected activity by reporting discrimination and requesting accommodations for her disability. Blatt continually reported to her superior that she was subject to degrading and discriminatory comments on the basis of her disability. And when she requested as accommodations for her disability a female nametag and uniform and use of female restroom, she was temporarily forced to wear an inaccurate name tag and was not allowed to use the female restroom. The court found that Cabela's responses to Plaintiff's requests for accommodations amounted to a "pattern of antagonism."

6. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., 201 F. Supp. 3d 837 (E.D. Mich. Aug. 18, 2016).

Defendant funeral home employed Plaintiff funeral director and embalmer for six years under the name Anthony Stephens before receiving notice of Plaintiff's intention to live and dress as a woman. Plaintiff made clear that all dress code rules would be followed, but defendant employer fired Plaintiff regardless.

The EEOC brought suit against the funeral home asserting two violations of Title VII: (1) wrongful termination of Stephens and (2) discriminatory clothing allowance. In the face of direct evidence of employment discrimination, the funeral home advanced two affirmative defenses to the first violation: (1) enforcement of a sex-specific dress code does not constitute impermissible sex stereotyping and (2) Religious Freedom Restoration Act (RFRA) prohibits EEOC from applying Title VII to force defendant to violate its religious beliefs. The court rejected the first defense, but agreed RFRA, in light of the *Burwell v. Hobby Lobby*, 134 S.Ct. 2751 (2014) decision, protects the funeral home from Title VII enforcement.

The court concluded that under *Hobby Lobby* RFRA protects private corporations, like the funeral home, and applies to "the government," which includes the EEOC. The court further found that the funeral home had met its burden of showing that Title VII "substantially burdens" its exercise of religion and is therefore entitled to an exemption unless the EEOC meets a two-part test. The court assumed that the EEOC had met part one, a showing of compelling government interest, but failed to meet part two, a showing that the burden on defendant is the least restrictive means of furthering the government interest. The court mentioned in dicta that had Stephens been the Plaintiff, the funeral

home would not have been able to successfully assert the RFRA defense. The EEOC has appealed to the Sixth Circuit.

7. *Ellingsworth v. Hartford Fire Insurance Company*, No. CV 16-3187, 2017 WL 1092341 (E.D. Pa. Mar. 23, 2017).

Plaintiff, a heterosexual female, worked for Hartford Insurance as a customer service representative. Over the course of her employment her supervisor made comments suggesting she was a lesbian including statements like, "she dresses like a dyke" and has "a lesbian tattoo." Her supervisor went so far as to tell co-workers she was a lesbian, eventually causing them to believe the false assertions. Plaintiff filed a complaint with Defendant's HR department, but the supervisor remained in her same role. As a result Plaintiff suffered depression and anxiety, and filed a complaint with the EEOC.

The court, relying heavily on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) denied the employer's motion to dismiss for failure to state a claim. The actions of the supervisor were found to be a sort of gender stereotyping prohibited under Title VII's "because of sex" language. The court characterized the allegations as clear discrimination based on the Plaintiff's failure to conform to traditional gender stereotypes.

8. *Spellman Ohio Department of Transportation*, 2:15-CV-1115, 2017 WL 1093281 (S.D. Ohio Mar. 22, 2017).

Plaintiff Spellman, a gay female highway technician, brought suit against the Ohio Department of Transportation ("ODOT") alleging hostile work environment for gender and sexual orientation based harassment under Title VII. ODOT argued that the Sixth Circuit had not prohibited discrimination on the basis of sexual orientation.

The court conceded that the Sixth Circuit had made clear that sexual orientation is not an explicitly protected class, but found Title VII to protect homosexual and transgender individuals from harassment for failure to conform to traditional sex stereotypes. The court held that Spellman may assert a claim of sexual harassment on the basis of sexual orientation because she offered evidence that she was harassed by both men and women "because of" her sex. However, the court granted summary judgment in favor of ODOT because Spellman failed to show ODOT knew or should have known of the harassment.

9. *EEOC v. v. IXL Learning, Inc.*, No. 17-cv-02979-VC (N.D. Cal. May 24, 2017).

On May 24, 2017, the EEOC sued IXL Learning, Inc. for violation of the retaliation provisions in Title VII and the ADA. The employee at issue, a project analyst, is a transgender man, and throughout his employment, coworkers questioned him about his gender identity, orientation, and expression. The employee requested to work remotely while he recovered from gender confirmation surgery, but his request was denied. The employee later learned that IXL had treated differently requests from other non-transgender employees to work remotely.

The employee then posted the following on Glassdoor.com, a job recruiting and ratings website: "If you're not a family-oriented white or Asian straight or mainstream gay person with 1.7 kids who really likes softball - then you're likely to find yourself on the outside . . . . Most management do not know what the word 'discrimination' means, nor do they seem to think it matters." The day after IXL learned about the post, and a few days after the employee made a discrimination complaint to his supervisor and the CEO, IXL terminated the employee. The suit is currently before the U.S. District Court for the Northern District of California, and remains pending.

C. Social Media and Free Speech Cases of Note

1. *City of Meridian v. Meadors*, --- So.3d ---, 2016 WL 7636445 (App. Ct. Miss. Dec. 16, 2016)

Plaintiff police officer, who was terminated based on a Facebook post, brought suit against the City of Meridian to challenge Meridian Civil Service Commission's affirmation of his termination. The post that led to Plaintiff's termination was a photo he posted during a meal break from his home, but while he was still on duty. The photo featured two chimps laughing, with the caption: "Earlier today, the mayor and the chief of police had a meeting." Plaintiff commented on the photo: "Something will probably be said, but I couldn't resist." After a few minutes he removed the photo.

The Police Department conducted an investigation that led to Plaintiff's termination. During the initial investigation of the speech, Plaintiff had confirmed that the post was created with Meridian's mayor and chief of police, both African American, in mind. After his termination, the officer filed an appeal with the Commission Plaintiff claiming that his posting was done on his own time and constituted free speech protected by the First Amendment, and requesting full reinstatement. The Commission upheld the City's firing concluding that there was no public concern interest in the speech and that his post "at best ridiculed the Mayor and Chief of Police's humanity" and "at worse was an expression of racial prejudice."

Plaintiff appealed to the circuit court, which reversed the Commission's order based on the fact that a necessary party did not approve Plaintiff's termination. The circuit court did not consider whether Plaintiff's post was protected by the First Amendment. The City appealed the circuit court's judgment, arguing that the circuit court applied the wrong standard of review, erroneously re-adjudicated the Commission's

determinations, and failed to address factually analogous case law. The court of appeals reversed the circuit court's judgment, concluding that the circuit court erred and that the officer's right to free speech was not violated. In so deciding, the court agreed with the Commission's finding that the posting of the photo did not address a matter of public concern, and instead was inherently racially insensitive and/or demonstrated insubordination toward his superiors. Because the speech did not address a matter of public concern, the officer's termination was justified and did not constitute a violation of his right to free speech. His termination was further justified because the Police Department's Code of Conduct and the Civil Service Code both contained provisions prohibiting expressions of racial prejudice, public criticism, ridicule of the Police Department, and offensive and antagonistic conduct toward supervisors.

2. *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. Dec. 15, 2016).

This case analyzes whether a social media policy itself can be unconstitutional. Two police officers brought suit challenging disciplinary actions for violations of the Police Department's social networking policy. Among other claims, the officers alleged that the social networking policy infringed their free speech rights. While off duty, the two police officers were posting and commenting concerns regarding potential consequences of rookies becoming instructors. The Chief of the police department determined that these posts violated the Department's social networking policy and Plaintiffs received an oral reprimand and six months' probation. One plaintiff, Liverman, was ultimately terminated.

The district court granted Liverman summary judgment on his claim that the social networking policy infringed his right to free speech, but also found that the Chief was entitled to qualified immunity because the policy and contours of protected speech in this area were not clearly established. The district court denied the other officer's challenges to the policy and the discipline holding that his speech was purely personal and thus not protected by the First Amendment. The court of appeals held, among other things, that (i) the policy regulated officers' rights to speak on matters of public concern and violated the First Amendment right to free speech, (ii) the officers' comments spoke to a matter of public concern, and (iii) the Chief was not entitled to qualified immunity on the officers' free speech claims.

The policy at issue prohibited in "sweeping terms" the dissemination of any information that would tend to discredit or reflect unfavorably upon the Department or its employees." It also contained the following sort of language:

> No posting anything that would tend to discredit or reflect unfavorably upon Department or its employees.
>
> Negative comments on internal operations, or conduct of supervisors or peers that impacts public's perception of department is not protected by the 1st Amendment.
>
> Officers may comment on issues of public concern (as opposed to personal grievances) if comments don't disrupt workplace, interfere with work relationships or workflow, or undermine public confidence. Judged on case-by-case basis.
>
> Officers strongly discouraged from posting information regarding off-duty activities, and violations will be forwarded to Chief for appropriate disciplinary action.

The Fourth Circuit stated that the policy undoubtedly regulates officers' rights to speak on matters of public concern as a "virtual blanket prohibition on all speech critical of the government employer." And, in response to the Department's argument that the public concern provision significantly narrows the reach of the social networking policy, the court held that the milder language of that single provision does not salvage the unacceptable overbreadth of the social networking policy taken as a whole.

The court also determined that the employees were terminated in violation of their First Amendment rights. In so holding, the court held that the posts and comments were to be considered as a whole, as opposed to separate posts, and determined that the posts spoke on a matter of public concern. They read as one whole conversation about rookies thrust into teaching roles and held that the conversation did not constitute airing personal grievances. Rather the posts were part of an ongoing public debate about the propriety of elevating inexperienced police officers to supervisory roles.

In holding that the Chief was not entitled to qualified immunity, the court reasoned that the right against a sweeping prior restraint prohibiting any negative comments on internal operations or conduct of employees is a clearly established right.

3. *Helget v. City of Hays*, 844 F.3d 1216 (10th Cir. Jan. 4, 2017).

Plaintiff, an administrative secretary for the City of Hays, filed suit arising from her termination and alleging that the City violated her First Amendment rights and fired her in retaliation for providing an affidavit in support of a former police officer's wrongful-termination litigation against the City.

Without consulting the City, Plaintiff executed an affidavit that contained confidential information in support of litigation involving a former City of Hays police officer. Plaintiff was fired shortly thereafter based on the following reasons cited in a memo from the Police Chief: (i) lack of communication and interaction with command staff; (ii) negative interactions with staff; (iii) violations of the City's personal-internet-use policy; and (iv) disclosure of confidential information in litigation related to a former officer. Plaintiff's suit alleges that the City terminated her in retaliation for her exercising her First Amendment right to testify truthfully, to speak out on a matter of public concern, and for conspiring to violate her First Amendment rights.

The district court granted summary judgment in favor of the City concluding that the City's strong operational interest in maintaining trust among its employees outweighed Plaintiff's interest in her speech regarding a former employee's litigation. In determining whether the speech was outweighed by the City's interests, the court considered how disruptive the speech was. The court held that an employer only need establish that the speech could *potentially* become so disruptive to the employer's operations so as to outweigh the employee's interest in the speech. The court of appeals affirmed, concluding that Plaintiff's speech was disruptive and the City's operational interests outweighed Plaintiff's speech interest.

III. DEVELOPMENTS IN THE TEXAS LEGISLATURE

A. Disclosure of Certain Governmental Settlements

House Bill 53 passed the House and Senate, and is now just awaiting the Governor's signature. HB 53 prohibits local governments from requiring a party seeking affirmative relief against a local government to keep confidential any fact, allegation, evidence, or other matter when the settlement paid from the government to the party is $30,000 or greater. Because local governments often settle employment discrimination and other employment-related claims as a more economic method of resolving such claims early and efficiently, with a nondisclosure agreement being a critical component and motivator for the settlement, HB 53 may ultimately discourage local governments from settling. If not vetoed by the Governor, HB 53 will take effect September 1, 2017.

B. Employee Leave Policies

House Bill 88 passed the House and Senate, and has been signed by the Governor. HB 88 amends the Labor Code to provide that an employer engages in an unlawful employment practice if it has an employee leave policy allowing an employee leave to care for or otherwise assist the employee's sick child but does treat the same an employee's request for leave to care for a sick foster child. HB 88 becomes effective on September 1, 2017.

C. Workers' Compensation

House Bill 451 waives the government's immunity for a suit brought by a first responder alleging employment discrimination because the responder filed a workers' compensation claim. A "first responder" is defined as a "public safety employee or volunteer whose duties include responding rapidly to an emergency" and includes peace officers whose duties include responding rapidly to an emergency, fire protection personnel, and certified volunteer firefighters that are part of a fire fighting unit. If not vetoed by the Governor, HB 451 will take effect September 1, 2017.

House Bill 1983 allows first responders to receive workers' compensation for post-traumatic stress disorder as a compensable injury if the disorder is based on a diagnosis that (1) an event occurring in the course and scope of the first responder's employment caused the disorder; and (2) a preponderance of the evidence indicates that the event was a substantial contributing factor to the disorder. A "first responder" is defined as a peace officer; licensed emergency care attendants, emergency medical technicians, and paramedics; and certified firefighters whose principal duties are firefighting and aircraft crash and rescue. The legislation has been signed by the Governor and takes effect September 1, 2017.

House Bill 2082 provides that the Office of Injured Employee Counsel (OIEC) must designate an OIEC employee to act as a first responder liaison. The liaison will assist injured responders and the responders' ombudsman during the workers' compensation administrative dispute resolution process. In addition, employers of first responders are obligated to notify their first responders of the liaison in the manner directed by the OIEC. A "first responder" is defined as a peace officer; licensed emergency care attendants, emergency medical technicians, and paramedics; certified firefighters whose principal duties are firefighting and aircraft crash and rescue; volunteer firefighters; and emergency medical services volunteers. If not vetoed by the Governor, HB 2082 will take effect September 1, 2017.

D. Job Protection for Public Employees in Military Service

House Bill 2486 requires state, city, or other political subdivision employers that have at least five full-time employees who are members of the Texas military forces, a reserved component of the armed forces, or of a state or federally authorized urban search and rescue team, to restore such an employee to the position the employee held before the employee was ordered to duty upon return from duty. Because HB 2486 received votes of more than two-thirds of the members in the House and Senate, it went into effect May 24th, 2017.

E. Bathroom Bills

Legislation aiming to restrict access to restrooms and changing facilities based on a person's biological sex, also known as "Bathroom Bills" were a hot topic in the 2017 Texas Legislature. Though none of the Bathroom Bills made it into law before the end of the regular session, Lieutenant Governor Dan Patrick is urging Governor Greg Abbott to take up the issue in a special-called session. The main Bathroom Bills, any of which could be revived in substance in a special-called session or future sessions, are summarized below:

- Senate Bill 6 passed the Senate but died in a House committee. SB 6 would have amended the Local Government Code to require public schools, public universities, local governments, and state agencies to require that each of its multi-occupancy bathrooms or changing facilities "be designated for and used only by persons of the same biological sex." SB 6 also would have prohibited local governments from regulating use of private entity restrooms and changing facilities, thereby pre-empting existing ordinances that permit transgender individuals to use the bathroom consistent with their gender identity.
- Senate Bill 2078, by way of a last-minute amendment in the House, would have required school districts to require transgender students to use only single-occupancy restroom or changing facilities. SB 2078 failed after the Senate refused to concur on the amendment.
- House Bill 2899 never made it out of the House committee but would have prohibited local governments from adopting or enforcing ordinances to (1) protect a class of persons from discrimination, or (2) reduce or expand a class of persons protected under state law from discrimination.[1]

IV. OTHER DEVELOPMENTS OF NOTE

A. President Trump Proposes Six Weeks' Paid Parental Leave in Budget

President Trump released his final 2018 budget proposal in late May. It includes a proposal requiring states to establish paid parental leave programs that provide six weeks of paid family leave to new mothers and fathers, including adoptive parents. The proposal states that the programs will be fully funded through offsets to the unemployment insurance system including "reforms to reduce improper payments, help unemployed workers find jobs more quickly, and encourage states to maintain reserves in their Unemployment Trust Fund accounts." According to the proposal, states will have "broad latitude" in designing and financing the program to meet their state's particular needs.

B. President Trump's Revised Travel Ban Remains Halted

On March 6, 2017, President Trump released his revised "Executive Order Protecting the Nation from Foreign Terrorist Entry into the United States." The Order bans foreign nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen who were (1) outside of the United States on the date of the Order; (2) did not have a valid visa as of January 27, 2017 (the date of the original travel band order); and (3) did not have a valid visa on the date of the Order. On March 25, 2017 the U.S. Court of Appeals for the Fourth Circuit ruled that the travel ban should continue to be blocked, teeing up the issue for the U.S. Supreme Court to consider if it chooses. Though entities employing or wishing to employ individuals from the affected countries do not have to change any of their current practices since the Order is not in effect, employers should continue to follow the issue in the event the Order is reinstated.

[1] If a Bathroom Bill is enacted into law, opponents will almost certainly use a recent court decision out of the Seventh Circuit to support their argument that such legislation is legally impermissible. In *Whitaker v. Kenosha Unified School District*, No. 16-3522 (7th Cir. May 30, 2017), the Seventh Circuit upheld a preliminary injunction that allowed a transgender student to use the restroom consistent with his male gender identity, concluding that the student established a probability of success on the merits on his Title IX and Equal Protection claims.