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Bringing Polarized Workplaces Together in the #MeToo, Post-*Obergefell*, and *Masterpiece Cakeshop* Era

It's hard to read the news without seeing daily evidence of these polarized times. Regardless of one's personal views, employers are also increasingly faced with challenges in the workplace as businesses large and small grapple with a changing society—and changing societal norms. This article explores some of the latest questions and aims to propose best practices when employers are faced with familiar as well as novel questions governing their behavior as well as their employee's workplace conduct.

LGBTQ Issues in the Workplace Post-Obergefell[1]

A man in the workplace is busily preparing for his wedding day. He has always been a private person and didn't discuss his sexuality with his co-workers. His colleagues, not realizing he is gay, ask what the lucky girl's name is. They mean no offense, but the man now feels put on the spot. Feeling somewhat uncomfortable, he responds, "Gary." Is this unlawful harassment? If the man is later turned down for a promotion due to his sexual orientation, is that unlawful?

Although Title VII does not expressly include sexual orientation or gender identity as a protected class, the EEOC has long taken the position that Title VII's ban on discrimination based on one's sex is unlawful. Now some courts seem to be catching up. The Seventh Circuit recently took up the question of whether it was illegal to discriminate in employment based on sexual orientation. *See Hively v. Ivy*

[1] *Obergefell v. Hodges*, 135 S.Ct. 2584 (2017).

Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017). In finding that the plaintiff stated a claim for unlawful discrimination based on sex, the Seventh Circuit noted the "paradoxical legal landscape" that would result post-*Obergefell* decision if a lesbian woman can marry on Saturday and be fired on Monday for that act. *Id.* At 342. Similarly, the court noted the "sharp tension between a rule that fails to recognize that discrimination on the basis of the sex with whom a person associates is a form of sex discrimination, and the rule, recognized since *Loving v. Virginia*, 388 U.S. 1 (1967), that discrimination on the basis of the race with whom a person associates is a form of racial discrimination. *Id.* The Seventh Circuit concluded that workplace discrimination based on sexual orientation is unlawful under Title VII.

The Second Circuit recently found that a gay person stated a claim for sex discrimination based on gender stereotyping following *Price Waterhouse v. Hopkins*.[2] *See Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195 (2nd Cir. 2017). As recently as February 2018, the Second Circuit Court of Appeals, also determined that an employee is "entitled to bring a Title VII claim for discrimination based on sexual orientation." *Zarda v. Altitude Express, Inc.*, -- F.3d --, 2018 WL 1040820 (2nd Cir. Feb. 26, 2018) (reasoning that sexual orientation discrimination is a sub-set of Title VII's prohibition of discrimination based on one's sex). Many other intermediate appellate courts have reached the opposite conclusion. District courts are divided on the question. This question appears ripe for a challenge in the United States Supreme Court.

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[2] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

In addition to federal law, many states and municipalities have enacted laws expressly specifying sexual orientation and gender identity or fluidity as a protected class. Although the Supreme Court has not yet weighed in on whether Title VII covers sexual orientation or gender identity, employers must take any issues stemming from such issues seriously. Even if the question under Title VII is unresolved, there is a growing line of state and federal laws that outlaw discrimination based on one's sexual orientation or gender identity. Ultimately, discrimination in the workplace because of an employee's sexual orientation or gender identity is not a sound business practice.

#MeToo, Now What?

Two colleagues sit at a sidewalk café one sunny mid-day discussing the latest changes to their accounting software and wondering aloud about who will be invited to speak at the next industry conference. It's a conversation not unlike many taking place every day in every city and every town in America. But the conversation takes a more personal turn as the two colleagues begin to discuss the impact of the #MeToo movement and what it may mean in their industry. As colleagues around the country share their own #MeToo moments, employers are well-advised to revisit their discrimination and harassment policies and develop an action plan for handling complaints.

By now, most employers in the United States are more than familiar with the prohibitions in Title VII against discrimination, harassment, and retaliation, the *McDonnell Douglas* test, and most have an anti-discrimination and harassment policy in writing. Many have long conducted investigations into alleged sexual

harassment and meted out disciplinary action when appropriate. Does #MeToo change an employer's obligation when an employee raises an allegation of sexual harassment? Should it? If so, what is now an appropriate response?

It should go without saying that any allegation of sexual harassment (or harassment based on any protected class) should receive prompt and serious attention. A thorough investigation should be undertaken and completed. But, it is also important for employers to remember that Title VII does not create a general civility code for the workplace. Some conduct, while questionable or even boorish, may not rise to the level of illegal harassment. Even though there have been many recent calls for various public figures to either step down or step aside, does this translate into an expectation that employers should now enact zero-tolerance sexual harassment policies? Does this come with potential down-side risk—like the male employee who challenges his dismissal because a female engaged in similar behavior but was either not disciplined or not terminated? What if the behavior at issue occurred outside the workplace? What if it predated the employee's tenure with the company? What if the accusation is not credible? While it may be tempting to say, "I believe the women," (if ever a long overdue acknowledgement there was) what if the accuser is male? What if the accused and the accuser are the same gender? None of these issues yields a single or a simple answer for an employer.

In this arena, employers and their counsel should be sensitive to the expectations that #MeToo may raise in employee's minds, but would be well-advised to employ the appropriate legal framework to the particular issue at hand. Knee-jerk calls for a resignation or demands that an employee be fired on the spot,

may make for splashy headlines, but may open up an employer to claims of reverse discrimination (if a man is accused), sexual orientation discrimination, defamation, or other state law tort theories. And simply firing every accused employee may give a handful of unscrupulous employees a potent—but potentially unjust—tool.

Before a complaint occurs, take this moment to review your organization's written policies. Do they need updating? Make a plan to re-communicate the company's policies to all employees on at least an annual basis. Encourage employees to ask questions, grapple with hypothetical scenarios, and engage with their peers and superiors to discuss these issues openly. Take steps to implement thoughtful preventative measures. Many employees will (silently) groan when they're told it's time for harassment training. Do it anyway. Explain what harassment is and what it isn't. But recognize that just because certain conduct may not be "severe or pervasive" and rise to the level of harassment regarded by courts for legal liability, unwanted behavior in the workplace can lead to reduced productivity, negativity, and may cause valued employees to simply quit instead of confront their harasser. Listen to everyone's viewpoints. In the wake of #MeToo, men have expressed surprise at some of the things women see as offensive. And some people worry whether #MeToo will create a backlash of unfounded accusations, once again making it that much harder for victims of harassment to speak up. Encourage employees to come forward privately to discuss any concerns they may not feel comfortable sharing in a public setting. Educate your employees. An ounce of uncomfortable prevention is worth a pound of cure.

When a complaint is received, it remains imperative for employers to take all complaints seriously. Avoid prejudging the situation. Conducting a prompt, comprehensive, and unbiased investigation is of even more paramount concern. In smaller organizations without or with limited human resources professionals, that may mean hiring an outside investigator. Gather information from the complainant. What happened? When did it happen? Who else saw what happened? Did you tell anyone what happened? Are there any written communications? Is there a cell-phone video or picture? Was this the first time this happened? If not, when was that? Interview all employees who may have witnessed the alleged behavior, heard about it, been party to it, or received similar treatment. Interview the accused. Check company records, including email and computer records. If there are video-cameras on the premises, check those. Ask to see cell phone records, text messages, and the like—recognizing that you may not be able to force this if it's a personal device and depending on the laws in your jurisdiction. Once all the evidence is gathered and analyzed, decide whether and to what extent discipline is necessary. What discipline will be appropriate? What steps can you take to ensure this sort of incident doesn't recur? What types of discipline have been used in similar circumstances in the past? (Note: This shouldn't always be the deciding factor if discipline was not sufficient in the past to correct the problem). Write a comprehensive memorandum describing all of the steps taken and the results. Communicate the results to the proper parties as appropriate. Keep a written record so that you can recall how you handled past situations if and when a future complaint arises.

Retaliation Remains an Important Theory of Recovery

In addition to prohibiting discrimination and harassment, Title VII and other federal employment laws outlaw retaliation against employees who complain about discrimination or harassment. The anti-retaliation provisions protect employees who complain about discrimination formally or informally, who file complaints with state or federal agencies, or who participate in investigations or lawsuits, including as witnesses, regarding alleged discrimination or harassment. Increasingly in litigation, juries determine that an employer has not engaged in conduct that as discriminatory or harassing but has retaliated against the plaintiff employee. Attorneys advising employers must consistently advise supervisors, managers, and senior management of their obligation to guard against any action that could be retaliatory or seen as retaliatory after an employee has raised the issue of discrimination or harassment.

Freedom of Speech and Freedom of Religion in the Workplace In Light of Masterpiece Cakeshop[3]

A group of colleagues gathers in the break-room eagerly chatting about their weekend plans and welcoming back a colleague who had been on vacation. The colleague, a devout Muslim, went to visit Mecca in Saudi Arabia. Upon returning, the colleagues inquired how the trip went, what their colleague saw and experienced, and a brief discussion of religion occurred. Later, one of the colleagues, who does not practice any faith, reports the discussion to the human resources manager expressing discomfort with some of the views expressed. When the Muslim

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[3] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n,* Case No. 16-111 (Pet. for Cert. Granted June 26, 2017).

employee is asked about the conversation, he calmly says he is sorry if anyone was offended, but feels it is his right to respectfully discuss his religion in the workplace. What is an employer to do?

It is important to recall what the First Amendment does and what it does not do. The First Amendment to the United States Constitution (and many state constitutions) is fundamentally a limit on what the government can do. So, the first question an employer must ask is whether this is a private or a public entity? Is the organization a federal contractor? If so, the rules that apply to the government or a contractor may differ from what rules apply to strictly private businesses. Although an employee may be tempted to respond by saying, "Well, it's my First Amendment right to speak my mind," or "It's a free country," it is important for employers to recall the interplay between freedom of speech or freedom of religion and Title VII's proscription of a hostile work environment. While the hypothetical above—if an isolated incident—may not be cause for alarm, it does merit an employer's attention. Some examples of religious harassment may include:

- A supervisor who is a Jehovah's Witness asks an employee to join him each morning to read from *The Watchtower*, a religious publication. When the employee politely declines, the supervisor says "I was really hoping you'd agree because now I'm not so sure I can give you that promotion." This is an example of quid pro quo religious harassment.
- An employee who is a devout Christian regularly wears a small gold cross on a chain around her neck but does not otherwise display religious items in the workplace nor does she discuss her religion at work. Another group of

employees, who are Jewish, regularly deride her necklace and make repeated jokes about her not being part of the "true faith." The Jewish employees leave notes and offensive pictures of Jesus for the Christian employee to find. The employee is upset by their comments and despite requests that they not discuss their religious beliefs or hers, the behavior continues for several months. She tries to avoid the group of employees, but due to her work assignments, she must interact with them. This is an example of religious harassment based on a hostile work environment.

- A Muslim woman who works as a secretary wears a hijab in the workplace. At first, her colleagues are respectful. One employee timidly asks the Muslim woman why she wears a hijab. She is happy to explain the reasons why her faith prescribes that she wear a hijab. But soon the once-timid employee begins asking increasing numbers of questions with increased frequency and some take on a cruel tone. At the outset, this is probably not religious harassment. But as the number and frequency of questions increases, this could become religious harassment based on a hostile work environment.
- An evangelical employee strongly and sincerely believes that her religion requires her to post religious messages in her own workspace and to respond to her colleagues by saying things like "Thank you, have a blessed day," or "Thank you, Praise the Lord." Several of her colleagues find the comments to be offensive and do not want to be subjected to religious commentary in the workplace. This is a closer call and will depend on the facts of the given situation. Some courts have found that an employer need

not accommodate an employee's sincerely held religious beliefs when it could constitute harassment of others or violates a diversity or nondiscrimination policy. Other courts have found in favor of the employee using religious comments in the workplace—particularly if her conduct was merely an annoyance.

Does the *Masterpiece Cakeshop* case change the analysis for even private businesses? The question in that case is whether Colorado's public accommodations laws operate to require a business owner to create an expression for customers with whose beliefs the business-owner's sincerely held religious beliefs conflicts. In that case, a homosexual couple wanted to buy a wedding cake from Masterpiece Cakeshop in Lakewood, Colorado. The owner declined citing his own sincerely held religious beliefs. The Supreme Court's opinion has not yet been issued. The case was argued on December 5, 2017. The case sits at the intersection between growing societal acceptance of the LGBTQ community, the legalization of same-sex marriage, and freedom of religion and speech.

Concluding Thoughts

In an era of increasing societal acceptance and recognition that the discrimination and harassment laws have not operated as they were intended, employers must be increasingly aware of and sensitive to the various ways the anti-discrimination and anti-harassment laws work, when they may apply in seemingly novel situations, and what strategies to employ when faced with a complaint. First, revisit your written policies and determine if they need to be updated or revised. Next, start a dialog with employees in training sessions so that unwitting violations

may be less likely. Even if the conduct at issue isn't illegal, it can still become disruptive and lead to negativity in the workplace. While it won't be possible to avoid every hurt feeling, strive toward a more understanding, cohesive, and harmonious workplace. This starts at all levels of the workforce. Finally, learn to recognize the behaviors that could lead to complaints. If possible, take corrective action early. If a complaint arises—even in a novel factual scenario—take it seriously, investigate it thoroughly and promptly, and decide if corrective action is needed and what type of discipline is appropriate. Document your decision. Encourage all employees to speak up. In this era, the message should be, "If you see something, say something."