



## 2022 Guide to Public Workplace Law *or: Sex, Drugs & Political Patronage – Why Employment Law is So Much Fun!*

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## Discrimination and Harassment

- ▶ Federal statutes apply to employers with 15+ employees except Age Discrimination in Employment Act, which applies to all public sector employers
- ▶ Texas Chapter 21 applies to public sector employers regardless of size
- ▶ 2021 Texas legislation expanded liability for sexual harassment to any supervisor/manager/HR who didn't act "immediately" to correct the harassment

## “Protected Classifications”

- Race
- Religion
- Ethnicity
- Sex
- Sexual Orientation/Gender Identity/Gender Stereotyping
- Age (40+)
- Disability/Genetic Information
- Protected Activities/Retaliation



## Common retaliation claims

- Texas Whistleblowers Act
- Workers' Comp retaliation
- EEO complaint retaliation
- Wage/hour complaint retaliation (overtime)
- On protected leave
- Political patronage retaliation
  - Exception for “cabinet level” positions

# Sexual Harassment after the #MeToo Era

## THE LAW OF SEXUAL HARASSMENT HASN'T CHANGED MUCH

- ▶ Severe or pervasive
- ▶ Based on sex
- ▶ Knew or should have known
  - Good, publicized policies
  - Clear reporting
  - No retaliation
  - Training
- ▶ Fair investigation
- ▶ Prompt remedial action
- ▶ 300-day limitations

#MeToo Era

## SO WHAT HAS CHANGED?

- ▶ Speed of exposure
- ▶ Age of allegations
- ▶ Less stigma
- ▶ New ways employers “should have known”
  - #MeToo posts on social media?
- ▶ “Prophylactic gender separation” affects career opportunities
- ▶ #BelieveWomen – sex discrimination at work?



#MeToo Era

## Most Hostile Environment Harassment Claims:

*“You’re not as funny or charming as you think you are”*

- Jokes
- Teasing
- Forwarding
- Touching
- Imitating



## Managing Employee Leaves, Health Issues, Disability & Job Accommodation

### Family & Medical Leave Act

- ▶ FMLA protects job for 12 weeks while out for certain reasons:
  - Childbirth/Adoption (moms and dads)
  - Employee's Serious Health Condition
  - Serious Health Condition In the Family (parent/child/spouse)
  - Time off to attend to family member's reservist activity or foreign deployment – "Qualifying Exigency"

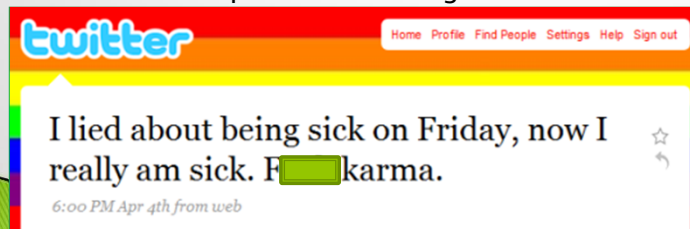
## FMLA Leave is Protected



- ▶ No discipline
- ▶ No negative comments about leave
- ▶ No lowered evaluations for dependability
- ▶ For attendance warnings, separate out the unprotected absences
  - ▶ How did employee perform when not on protected leave?
- ▶ No retaliation after leave

## You can use social media to investigate leave fraud, but . .

- ▶ Stored Communications Act does not allow unauthorized intrusion into private social media accounts
  - Authorized User Exception: Someone with “friend” or “follower” status can provide employer screenshots,
  - Lose exception if access is coerced; easy test to fail/don’t ask
  - Beware of “Surreptitious Friending” – don’t use third party



## Leave must be taken for correct purpose

- ▶ Texas constitution does not allow gifts of paid time off when not pre-stated in policy
- ▶ Can't let employee run out sick leave to get to retirement if not sick
- ▶ Must investigate fraudulent use of leave
- ▶ Aug 2022 8<sup>th</sup> Cir case – Municipal taxpayers have standing to sue for spending revenues for unlawful purpose – applied to paid time off (*Huizenga v. ISD No. 11*, 8<sup>th</sup> Cir 8/11/22)

## ADA-AA Bottom Line:

- ▶ Reasonable accommodation of most health issues
  - Essential Functions
  - Undue Hardship
  - Direct Threat of Imminent Harm
  - ALWAYS engage in Interactive Process
- ▶ Err on the side of:
  - It is a disability and it **can** be accommodated
  - Flexible policies



## The accommodation process

### ► INTERACTIVE PROCESS – DOCUMENTED

- Is there anything we could do so that you can perform the essential functions of your job?
- Employee should ask:
  - “I could do this *whole* job if only the employer would \_\_\_\_\_.”
  - “Is that a reasonable request?”
- Any other jobs open?
- Could reasonable time off solve the problem?
  - FMLA?

## SERVICE ANIMAL AGREEMENTS?





## If I can't ask about disability or health . . .

- ▶ How do you hire people who can actually do the job??



## Interview should demonstrate abilities

- Explain what this report/order/statute tells you.
- Tell me how you would handle this situation.
- Show me how you would enter this in Excel.
- Show me how you would do a safety check on this equipment.
- Write a summary/chrono of this situation.
- Take a spelling/grammar test.



## 1<sup>st</sup> Amendment Balancing Test

### Three-part test for public employees:

#### 1. Is employee speaking as citizen or employee?

Employer can regulate speech it has paid for

#### 2. Is the speech a matter of public concern?

Only public concern is protected

#### 3. Does the employer's interest in maintaining an efficient and effective workplace outweigh employee's interest in free speech?

## IS “LIKING” A CANDIDATE PROTECTED SPEECH?

- Several courts now agree that “liking” a Facebook post is a form of speech
  - “21<sup>st</sup> century yard signs”
- Now “liking” must also go through the 1<sup>st</sup> Amendment balancing test



FREE SPEECH RIGHTS

## No Free Speech Right

- ▶ First grade teacher terminated
  - Parent complained she had referred to her students as “future criminals” on Facebook
- ▶ ALJ:
  - “thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.”
- ▶ Court:
  - “conduct destroys public respect for government employees and confidence in the operation of public services.”

## Protected Speech?



Court: "At best, ridiculed their humanity and at worst was an expression of racial prejudice"



# *QUESTIONS?*

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