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An update on new federal law and regulation affecting your workplace

David S. Fortney and H. Juanita (Nita) Beecher, Editors
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NLRB POLITICS

Hy-Brand matter reveals political questions at NLRB

by Burton J. Fishman
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If there were any doubt that the National Labor Relations Board (NLRB) remains the agency most affected by the political changes that have consumed Washington, the recent oscillations about the Hy-Brand decision should end all discussions.

Some history

It all started with a concerted effort by the Obama administration to change the basic rules about who is considered "in charge" of a workforce and therefore responsible for such matters as collective bargaining, unfair labor practices, and Fair Labor Standards Act (FLSA) complaints. For decades, those with direct control of the day-to-day terms and conditions of employment (hiring, firing, pay, discipline, scheduling) have filled that role. During the Obama years, starting with memoranda from the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) and the General Counsel of the NLRB, the "battle lines" were drawn for an attack on the old order.

That effort culminated in the NLRB's 2015 decision in *Browning-Ferris,* which held that a business that exerts indirect control over another business's workers can be considered their "joint employer" in NLRB election cases and unfair labor practice proceedings. The ruling created confusion about the bargaining obligations and business relationships of employers everywhere, especially among franchisors and franchisees and contractors and subcontractors. Predictably, Browning-Ferris appealed the NLRB ruling. And that is where things get interesting.

Hy-Brand ruling

Although the case was argued before the U.S. Court of Appeals for the District of Columbia Circuit in March 2017, no decision had been issued by the time a new president and a new NLRB membership were in place. In one of the NLRB's (short-lived) Republican majority's first decisions, *Hy-Brand Industrial Contractors,* the Board reversed *Browning-Ferris.* In keeping with standard procedures, the Board then informed the D.C. Circuit of its decision and asked that the case be returned to it, which it was. Now things get even more interesting.

None of the energy behind the effort to change the "direct/indirect control" issue had dissipated with the election. Many Democrats were eager, in light of the loss of "blue-collar" support in the 2016 election, to demonstrate their continued backing of prolabor positions. A coordinated—albeit sub-rosa—effort commenced to undermine the *Hy-Brand* ruling. The vehicle for doing so was the affiliation of NLRB member William Emanuel with his old law firm, Littler Mendelsohn, which represented one of the parties in the *Hy-Brand* case, Leadpoint Business Services. Emanuel participated in the case and was in the 3-2 majority that ruled for Hy-Brand and Leadpoint.

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Those efforts, including claims of ethical wrongdoing from senators, ultimately led to an all-but-unprecedented report from the NLRB inspector general (IG) concluding that Emanuel should have recused himself from the *Hy-Brand* case because of his law firm's role in representing Leadpoint. In the face of the IG's report, the now four-member Board voted to vacate the *Hy-Brand* decision and inform the appellate court that *Browning-Ferris* was again properly before it.

Where matters now stand

Absent congressional action, this appears to be where matters will rest on the legal issues in *Browning-Ferris* and *Hy-Brand.* Hy-Brand has recently filed a motion with the NLRB alleging its procedures were violated when it vacated the *Hy-Brand* decision. More important, it challenged the IG's authority to interpret the Trump administration ethics rules and alleged the report itself was legally insufficient in every respect. Most significant, this latest legal foray indicates that the recusal issue will become a major political litmus test for future Board members.

However, a critical continuing issue at the NLRB is the nature and scope of recusal. Emanuel insists he had no role in Hy-Brand and notes that in a firm of over 1,000 lawyers, his role was limited to a tiny percentage of matters. But simply being a partner in that "management" law firm was the basis for recusal. If that is the case, it is hard to know if there is a bright line anywhere.

What would you do with former NLRB General Counsel Richard Griffin, who not only served as General Counsel to the International Union of Operating Engineers (IUOE) but also was a long-serving member of the board of directors for the AFL-CIO Lawyers Coordinating Committee? Should Griffin have to recuse himself from all matters involving the interests of the AFL-CIO? In fact, the question is not much different for any NLRB member appointed by a Democratic president, almost all of whom have strong ties to labor unions or "labor" law firms. Member Lauren McFerran worked at one of the leading "labor" law firms in the country. Member Mark Gaston Pearce founded a prounion law firm. Former Chair Wilma Liebman represented the Teamsters for years and was general counsel of the Bricklayers Union. What is the standard for recusal they should have met or will have to meet? Be careful what you ask for.

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OSHA

OSHA 'look-back' window to issue repeat citations is unlimited

by Eric J. Conn and Dan C. Deacon
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The 2nd Circuit recently issued an opinion granting the Occupational Safety and Health Administration (OSHA) the ultimate leeway to characterize citations as "repeat." The case involved a repeat excavation-related OSHA citation issued to Triumph Construction Corp. in 2014. OSHA based the repeat characterization on a prior violation of the same excavation standard confirmed against Triumph from 2009.

Triumph's case

Triumph asserted to the Occupational Safety and Health Review Commission (OSHRC) administrative law judge (ALJ) and to the 2nd Circuit that the repeat citation was not appropriate because the amount of time that had passed from the original 2009 citation to the new 2014 alleged violation (nearly five years) was outside OSHA's stated repeat look-back policy in its Field Operations Manual. The OSHA Field Operations Manual in effect in 2014 was the 2009 version, which provided for a three-year look-back period to find prior violations to serve as the basis for a repeat violation.

In a 2016 update to the Field Operations Manual, the Obama administration expanded the repeat look-back period to five years. Regardless of what the manual said, Triumph's case implicated broader issues of whether OSHA's policy created a strict statute of limitations for the repeat look-back period and whether the agency has the authority, to change enforcement policies like the repeat look-back period on a whim, without rulemaking or legislation.

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The ALJ upheld the repeat citation, and on appeal, the 2nd Circuit held that because neither the Occupational Safety and Health Act (OSH Act) nor any regulations promulgated under the Act mandate or restrict any look-back period for repeat violations, OSHA was not bound by its own stated policy. In other words, OSHA has the discretion to search an employer's citation history as far back as it wishes to identify any substantially similar prior violations to serve as the basis for a "repeat" violation.

In effect, the 2nd Circuit authorized a potential unlimited look-back period for OSHA to issue repeat citations and clarified that the agency is not legally bound by its own stated policies. This poses serious problems for employers because it calls into question their ability to rely on OSHA guidance and policies. *Triumph Construction Corp. v. Sec. of Labor* (Docket No. 16-4128-ag, March 14, 2018).

That said, the 2nd Circuit's decision is not a surprise. The law has always been clear that there is no statutory limitation on the length of time a prior citation may serve as the basis for a repeat violation. OSHA historically looked back only three years for past violations, but the Obama administration extended the period to five years. However, the look-back period is merely a policy that OSHA does ignore from time to time when it suits its agenda. Indeed, the language in the Field Operations Manual, regardless of the stated time period, has always qualified that it is not a rigid deadline.

Additional OSHA actions

Extending the look-back period policy was just one of several actions OSHA took early during the Obama administration to deliberately seek and cite more repeat violations. David Michaels, Obama's assistant secretary of labor for OSHA, complained frequently that the agency's enforcement teeth were not sharp enough.

Without being able to change its civil penalty authority, OSHA changed numerous policies and practices with the specific intent to find and cite more repeat violations because repeat violations carried 10 times higher penalties than "serious" and "other-than-serious" violations. In other words, finding ways to characterize more violations as repeat was a way to raise OSHA penalties without being granted any new authority from Congress—so that is precisely what OSHA did.

In addition to expanding the look-back period to five years, the Obama administration's OSHA also broke down barriers between individual establishments so that a violation at one location of a multiestablishment company could be used as the basis for a repeat violation at any other location within that organization. OSHA also became more proactive in how it selected targets for inspections, which made it more likely for an employer to be visited multiple times during the look-back period.

Those policies were "successful," in that the percentage of OSHA violations characterized as repeat doubled during the Obama administration. Citations characterized as repeat now make up more than five percent of all OSHA citations.

That trend continued even after Congress gave OSHA new penalty authority, increasing the maximum price tag for a repeat violation from $70,000 per violation to approximately $130,000. As a result, we are seeing more OSHA enforcement actions with penalties over $100,000 and $1 million than ever before.

Bottom line

In light of the 2nd Circuit's ruling in the *Triumph* case, employers need to be extra vigilant in defending against initial citations if the cited standard presents a risk of future repeat violations, even if the initial penalty is very low. Paying the fine for a serious or other-than-serious citation today may seem like no big deal if it carries a relatively small fine, but it can easily lead to a repeat citation in three or four years (or eight years now that OSHA knows its look-back period is unlimited), which could turn that initial violation into a costly burden.

Employers also need to understand the numerous other ways repeat violations can harm them beyond just the 10-times-higher penalties. First, even under the Trump administration, OSHA is continuing to issue inflammatory and embarrassing press releases about citations in significant cases, which includes most enforcement actions involving repeat violations. So reputational harm can come to an employer just for being accused of committing a repeat violation.

Worse still is falling into the dreaded Severe Violator Enforcement Program (SVEP). The qualifying criteria for SVEP include repeat and willful violations in certain categories, but the data show the vast majority of employers dumped into the SVEP are there because of repeat violations. Even more reason to fight the initial violation, regardless of how low the initial penalty may be.

Finally, a repeat citation could increase insurance premiums and disqualify contractors and subcontractors from government and private-sector contracts. There are potentially costly consequences for accepting a citation that has a high possibility of becoming a repeat citation. Therefore, employers should strongly consider contesting OSHA citations if a settlement that mitigates the risk of future repeat violations cannot be reached.

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FEDERAL CONTRACTOR CORNER

OFCCP Director Harris issues first guidance

by H. Juanita M. Beecher
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Office of Federal Contract Compliance Programs (OFCCP) Director Ondray Harris' first public act as director is to require a national uniform practice at an agency not known for its uniformity. In Directive 2018-01, Harris directed the regional and district directors to issue Pre-Determination Notices (PDNs) in every compliance evaluation in which the agency believes either individual or systemic discrimination findings may exist. Contractors will then have 15 calendar days to rebut the OFCCP's proposed findings. Further, every PDN must be reviewed by the appropriate solicitor's office before being forwarded to the national office for final review. The new directive takes effect immediately, and any Notice of Violation (NOV) not yet issued must be withheld until a PDN is issued "to allow contractors an opportunity to respond to the agency's preliminary findings."

In the past, PDNs were reserved for matters of systemic discrimination, and the decision to issue a PDN was left to the discretion of the OFCCP district and region. That led to varying practices across the country. Further, when PDNs were not issued, the NOV often curtailed conciliation efforts and moved the compliance evaluation into a more adversarial posture. Harris' aim, as stated in the directive, is "to achieve consistency across regional and district offices, increase transparency about preliminary findings with contractors, and encourage communication throughout the compliance evaluation process."

Although a great many compliance evaluations are closed without any findings of violations, this directive is nonetheless a significant first step. Multijurisdictional contractors have been seeking greater consistency among the districts and regions of the OFCCP for years. For many of those contractors, working with different regions of the OFCCP has seemed as if they were dealing with entirely different agencies of the federal government. As a result, any efforts by the OFCCP to bring greater consistency are important.

Further, the promise of an earlier notification of the agency's findings and an assurance that contractors will have an early opportunity to respond hold out hope that more meaningful communications will take place in a less contested context than that created by an NOV. Most significant, the fact that PDNs will be reviewed by the national office will likely have the effect of tempering the positions of the more aggressive districts and regions—all of which may lead to more amicable resolutions of compliance evaluations.

OFCCP budget not cut in FY 2018 omnibus bill

The omnibus budget signed by President Donald Trump on March 23, 2018, provides OFCCP with $103,476,000 for fiscal year (FY) 2018. This is a substantial increase over the $91 million proposed by the Trump administration in its FY 2018 budget.

Birds Eye to pay $1 million settlement

The OFCCP Midwest Region has settled cases against three food industry companies. In the largest settlement, Birds Eye, a Wisconsin frozen vegetable processor, agreed to pay $1,008,878 in back pay and interest to resolve allegations of hiring, placement, and housing discrimination at its Darien facility.

A compliance review by the OFCCP concluded that the company discriminated against 423 qualified female applicants who were denied full-time and seasonal laborer positions, 603 qualified Hispanic seasonal employees who applied for full-time laborer positions and nine qualified migrant female employees who were denied housing subsidies. Birds Eye denied the claims but agreed to resolve the issue through a conciliation agreement (CA). Under the CA, in addition to the $1 million in back pay, Birds Eye will extend seven full-time and 16 seasonal job opportunities to females, extend 38 full-time job opportunities to Hispanic employees, and reimburse housing subsidies for nine migrant female employees.

Two other food industry contractors also signed CAs with the OFCCP. The Hillshire Brands Company, a packaged meat manufacturer, will pay $275,000 in back pay and interest to resolve allegations of hiring discrimination at its Storm Lake, Iowa, facility. The OFCCP alleged that the federal contractor discriminated against 159 white and 80 black qualified applicants who were denied production positions. Hillshire denied the claims but agreed to resolve the issue through a CA under which it will extend 29 job opportunities and revise its selection and placement procedures.

US Foods will pay $164,253.69 in back pay and interest to resolve allegations of hiring discrimination against female applicants at its Wixom, Michigan, facility. After the OFCCP alleged that the federal contractor discriminated against 60 qualified female applicants who were denied night order selector positions, the company denied the claims but agreed to resolve the issues through a CA, including extending seven job opportunities and revising its selection and placement procedures.

OFCCP sued for withholding documents under FOIA

A nonprofit public interest advocacy group, Public Citizen Inc., has sued the OFCCP over its use of law-enforcement exemptions to withhold documents requested under the Freedom of Information Act (FOIA). Public Citizen filed an FOIA request to obtain copies of FOIA requests made by other parties for EEO-1 reports as well as agency correspondence related to those requests.

According to Public Citizen, it requested the FOIA correspondence "to ensure we had a full understanding of who obtains EEO-1 reports and for what purposes." Although the OFCCP provided most of the documents sought by Public Citizen, it withheld certain documents under the exemptions for law-enforcement records or investigations. Public Citizen claims the OFCCP can't withhold documents related to other FOIA requests on the basis of the law-enforcement or investigation exemption. The lawsuit is *Public Citizen, Inc. v. Dept. of Labor, et al.* (D.D.C., No. 1:18-cv-00433), filed on February 26, 2018.

Humana to pay $2.5 million settlement

Humana has agreed to pay the OFCCP $2.5 million to settle claims that it engaged in discriminatory pay practices affecting 753 female employees at its Kentucky headquarters. The OFCCP alleged that Humana engaged in inequitable pay practices at its Louisville facility against women working as consultants, project managers, and managers so that they were paid less than similarly situated male employees. In addition to the settlement amount, Humana agreed to make pay adjustments and take steps to bring its pay practices into compliance.

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INSIDE THE EEOC

Gustafson nominated as EEOC general counsel

by H. Juanita M. Beecher
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President Donald J. Trump has nominated Sharon Fast Gustafson to be general counsel of the Equal Employment Opportunity Commission (EEOC) for a term of four years. For 26 years, Gustafson has practiced before the EEOC and the federal courts in a wide variety of employment-related disputes. After receiving her JD with honors from Georgetown University in 1991, she worked in the labor and employment law section of Jones Day. Since 1996, she has been engaged in the solo practice of law, advising and representing both employees and employers.

In 2016 the Metropolitan Washington Employment Lawyers Association awarded Gustafson its Lawyer of the Year award "in recognition of outstanding dedication to Civil Rights, Equality, and Justice." That award recognized Gustafson's work—starting at the EEOC and culminating at the U.S. Supreme Court—as plaintiff's counsel in *Young v. UPS,* in which she won legal protections for pregnant workers nationwide. Gustafson and her husband live in Virginia and have nine children and 11 grandchildren.

EEOC budget increased in FY 2018 omnibus bill

The omnibus appropriations bill signed by the president provides the EEOC with $379.5 million, an increase from the $364.5 million for fiscal year (FY) 2017.

Professional Endodontics settles age suit for $47,000

A Southfield, Michigan-based oral surgery practice agreed to pay $47,000 to settle an age discrimination lawsuit filed by the EEOC. The EEOC's lawsuit charged that Professional Endodontics, P.C., violated federal law by firing Karen Ruerat four days after her 65th birthday. According to the lawsuit, Ruerat, who had worked for the company for 37 years, was terminated in January 2016 under a company policy that required employees to retire at age 65. The EEOC filed suit in the U.S. District Court for the Eastern District of Michigan after attempting to reach a prelitigation settlement through its conciliation process.

The consent decree settling the suit, in addition to providing monetary relief to Ruerat, prohibits any similar discrimination in the future and requires Professional Endodontics to provide antidiscrimination

training to its employees. The training must include instruction on the practices made unlawful under the Age Discrimination in Employment Act (ADEA). *EEOC v. Professional Endodontics, P.C.*, Case No. 4:17-cv-13466.

"December 2017 marked the 50th anniversary of the ADEA," said Kenneth Bird, regional attorney for the EEOC's Indianapolis District Office. "Five decades later, the EEOC remains committed to vigorously enforcing that all-important law. Private employers need to understand that mandatory retirement policies run afoul of the ADEA and will be met with challenge."

IT company settles ADEA suit for $50,000

Diverse Lynx, LLC, a Princeton, New Jersey-based IT staffing firm with offices in Princeton and Noida, India, agreed to pay $50,000 and undertake significant remedial measures to settle an age discrimination lawsuit brought by the EEOC.

The EEOC alleged that Diverse Lynx violated the ADEA when, after learning an applicant's date of birth, the company sent the applicant an e-mail stating that he would no longer be considered for the position because he was "born in 1945" and "age will matter." The ADEA prohibits employment discrimination on the basis of age, including discrimination in referrals by employment agencies.

Under the consent decree entered by the court, Diverse Lynx is prohibited from considering applicants' age when deciding whether to refer them to a job opening. In addition, it may not request or solicit an applicant's year of birth before referring the applicant to a prospective employer. Diverse Lynx has agreed that it will provide its employees, including its managers and supervisors, with live training that addresses federal antidiscrimination laws and complaint and reporting procedures. It also agrees that it will not retaliate against persons who complain of discriminatory conduct or practices.

"A basic principle of anti-discrimination law requires that job applicants be judged on their individual qualifications. Employers and employment agencies that consider an applicant's protected trait, such as age, violate federal law and will be prosecuted," said EEOC senior trial attorney Rosemary DiSavino.

Kevin Berry, district director of the EEOC's New York District Office, added, "This case should send a clear message that federal anti-discrimination laws apply to employment agencies as well as employers. An employment agency's refusal to refer a qualified applicant because of the applicant's age is a plain violation of the ADEA."

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SEXUAL HARASSMENT

EEOC discusses employers' obligations in light of #MeToo

by H. Juanita M. Beecher
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On Tuesday, March 20, 2018, Equal Employment Opportunity Commission (EEOC) Acting Chair Victoria Lipnic opened an employer forum on #MeToo with an explanation of how the EEOC anticipated the #MeToo phenomenon as early as 2010. According to Lipnic, when she joined the EEOC as a commissioner in 2010, she was struck by the number of complaints involving harassment. In fact, she was told that the agency could have a docket of nothing but harassment cases generally and sexual harassment cases specifically.

Disturbed by the persistence of those complaints, in 2015, Lipnic and fellow commissioner Chai Feldblum co-chaired the Select Task Force on Sexual Harassment with the idea of preventing harassment in the workplace. The lessons learned by the Select Task Force have been discussed in previous *Federal Employment Law Insider* articles (e.g., see "EEOC launches new training programs to fight sexual harassment" on pg. 7 of our November 2017 issue).

EEOC Regional Attorney Roberta Steele then spoke about the current status of sexual harassment after #MeToo. While the agency has not seen an increase in charges of sexual harassment since the movement began, it believes that most of those who are subjected to sexual harassment and worse do not report it either internally to their employer or externally to the EEOC.

According to Steele, there is a compelling business case for employers to prevent harassment as they have paid in excess of $600 million to settle such complaints since 2010. In 2015, the agency collected over $125 million in settlements and $39 million through litigation.

Steele echoed the recommendations of the Select Task Force in saying that what is needed to prevent harassment is committed leadership, effective policies, multiple ways to report harassment, and training that fits the specific workforce.

Leslie Silverman, a shareholder at Fortney & Scott, LLC, and former vice chair of the EEOC, discussed how important effective investigation of sexual harassment is, stating that the investigation is not just to comply with the requirements needed for the *Faragher/Ellerth* affirmative defense but also to convince employees that management and HR take these complaints seriously. Employees won't report harassment unless they believe the company will take their complaints seriously and they won't suffer retaliation.

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EMPLOYEE COMPENSATION

OMB, civil rights groups tussle over halted EEO-1 changes

by Sean D. Lee
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The Office of Management and Budget (OMB) continues to clash with civil rights groups over the agency's decision last August to halt an Obama-era rule that would have required employers to turn over detailed employee compensation and hours-worked data as part of their annual EEO-1 filing. Most employers with 100 or more employees are required to submit a yearly EEO-1 form with the Equal Employment Opportunity Commission (EEOC) that provides a breakdown of their workforce by race/ethnicity, gender, and job category.

On August 29, 2017, the OMB announced that it would be halting the pay data collection from taking effect as scheduled in March 2018 because further review was required. In November, the National Women's Law Center (NWLC) and the Labor Council for Latin American Advancement (LCLAA) sued the OMB in federal court in the District of Columbia (*NWLC et al. v. OMB et al.*, No. 1:17-cv-02458), claiming the agency was illegally rolling back pay transparency requirements intended to root out discrimination and close the wage gap.

On February 13, 2018, the OMB moved to dismiss the case, claiming the plaintiffs lacked standing to bring the lawsuit because they did not suffer a cognizable legal harm and because the OMB's decision to stay the pay data collection is not yet a "final agency action" that a court can review. In a rebuttal filed two weeks later, the plaintiffs insisted that they did in fact suffer injury, claiming that their "education and advocacy efforts are harmed by the loss of [the] EEOC's publication of aggregate pay data" and that their "efforts to obtain favorable outcomes for their clients and members" are limited because of the stay.

On March 21, 2018, the NWLC and the Lawyers' Committee for Civil Rights (LCCR) filed another lawsuit in D.C. federal court, this time alleging the OMB failed to respond to multiple requests under the Freedom of Information Act (FOIA) asking the agency to disclose records relating to its decision to halt the pay data collection.

In a statement announcing the FOIA lawsuit, the NWLC explained that it "aim[s] to shine a light on the secretive process that led to the inexplicable decision to eliminate the pay data collection."

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DISCRIMINATION

Courts hold Title VII protects against sexual orientation, transgender bias

by Sean D. Lee
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Two federal appeals courts have issued decisions holding that Title VII of the Civil Rights Act of 1964's prohibition against sex discrimination also prohibits discrimination on the basis of sexual orientation and transgender status.

On February 26, 2018, the 2nd Circuit announced that Title VII's prohibition against discrimination on the basis of sex extends to prohibit discrimination on the basis of sexual orientation. In *Zarda v. Altitude Express*, the 2nd Circuit overturned its own precedent and concluded that a skydiving instructor who was allegedly fired for telling a customer he is gay is in fact covered by Title VII's protections against sex discrimination. Notably, the court reheard the case *en banc*—meaning all the judges in the 2nd Circuit participated in the case—leading to 10-3 decision in the former employee's favor.

The decision in *Zarda* largely tracks the reasoning in the Equal Employment Opportunity Commission's (EEOC) landmark 2015 decision in *Baldwin v. Department of Transportation* (EEOC Appeal No. 0120133080), in which the EEOC found that a claim of discrimination on the basis of sexual orientation necessarily states a claim of discrimination on the basis of sex under Title VII.

Notably, the 2nd Circuit joins the 7th Circuit on this issue. The 7th Circuit held *en banc* in 2017 in *Hively v. Ivy Tech Community College* that sexual orientation discrimination is a form of sex discrimination cognizable under Title VII.

In the week after *Zarda*, on March 7, 2018, the 6th Circuit held in *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.*, that a funeral home violated Title VII by firing an employee who notified the owner that she is transitioning from male to female and would present herself and dress as a woman at work. In overturning the lower court's opinion, the 6th Circuit held that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing [the employee] because she is transgender and transitioning from male to female." The 6th Circuit sent the case back for further proceedings.

Zarda, *Hively*, and *R.G. & G.R. Harris* stand in contrast to the 11th Circuit's decision in *Jameka K. Evans v. Georgia Regional Hospital*, in which the court declined to

overturn its precedent that Title VII does not explicitly prohibit sexual orientation discrimination. Although the U.S. Supreme Court declined to hear *Evans* in December, with the new rulings in *Zarda* and *R.G. & G.R. Harris*, it is increasingly likely that the high court will weigh in.

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SEXUAL HARASSMENT

Senate considers measures to combat harassment in congressional workplace

by Sean D. Lee
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On February 6, 2018, the U.S. House of Representatives voted to approve two measures that would strengthen protections for congressional staffers against workplace sexual harassment. The measures—H.R. 4924, the Congressional Accountability Act of 1995 Reform Act (the CAA Reform Act), and H. Res. 724—are now under consideration by the Senate.

The CAA Reform Act, introduced by a bipartisan group of House lawmakers on February 5, 2018, and passed the next day, would overhaul the current law that governs claims of sexual harassment made by the legislative workforce. Among other administrative and procedural reforms, the CAA Reform Act would require current and former members of Congress to reimburse the Treasury if an employee receives an award or settlement for an alleged act of discrimination or retaliation, and it would streamline the complaint process for staffers by eliminating mandatory preliminary counseling and mediation requirements.

The companion resolution to the CAA Reform Act, H. Res. 724, allows the House to immediately adopt certain administrative reforms, including creating an office where employees can seek guidance and counsel on employment issues, and requires every employing office in the House to adopt an antiharassment and antidiscrimination policy.

In a statement issued upon passage of the two measures, Committee on House Administration Chair Gregg Harper (R-Mississippi) wrote that the measures "will institute needed reforms to the congressional workplace" by bringing "more transparency, accountability, and stronger protections for employees."

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