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Cutting Edge Issues and Other Interesting Developments in Employment Law

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I. EMPLOYEE SURVEILLANCE AND MONITORING

A. Review of Employee Email

The Electronic Communication Protection Act (ECPA), 18 U.S.C. § 2701, makes it a criminal offense to (1) intentionally access without authorization a facility through which electronic communication services are provided; or (2) intentionally exceed an authorization to access that facility; and thereby obtain, alter, or prevent authorized access to a wire or electronic communication while it is in electronic storage in such system. Emails constitute electronic communication within the meaning of the ECPA.

The foregoing restrictions do not apply with respect to conduct authorized by (1) the person or entity providing a wire or electronic communications service; (2) a user of that service with respect to a communication of or intended for that user; or (3) as otherwise provided in sections 2703, 2704 or 2518 or title 18.[1]

Courts have generally upheld an employer's right to retrieve and read emails on employer-provided email systems.[2] Accessing employees' private websites and/or employees' private email accounts is a different matter and may violate the ECPA.[3] A slightly different scenario arises when employees use their work computers to access web-based email services such as Yahoo or Hotmail in order to send or receive emails on their personal email accounts. Such activity leaves electronic footprints on the employee's computer hard drive (often including a "snapshot" of pages from the Yahoo or Hotmail account). Such information can be very useful in investigating employee behavior. Presumably, because the electronic footprints reside on the employer's computer and/or server and access to the personal email accounts was via an employer provided internet connection, courts have generally found that the electronic traces left by such activity are no more protected than emails sent over an employer's server.

Employers who wish to strengthen their legal position with respect to mining company owned computers and servers for electronic information left behind by employees are well advised to implement email and internet usage policies emphasizing that employees have no expectation of privacy with respect to communications sent via company computers, servers, and/or internet connections, including communications sent through third-party email services using company provided equipment or internet access and advising employees that such activities are subject to monitoring by the employer.

B. Waiver of Attorney-Client Privilege Through Use of Employer Email

A waiver of the attorney-client privilege can occur when employees use employer-provided computer equipment or internet services to access third-party email providers in order to communicate with their attorneys. The outcome in these cases often hinges on the employee's

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[1] 18 U.S.C. §2701(c).

[2] *See e.g. Fraser v. Nationwide Mut. Ins. Co.*, 135 F. Supp. 2nd 623, 636 (E.D. Pa. 2001), *aff'd in part and remanded in part on other grounds*, 352 F.3d 107 (3d Cir. 2004).

[3] *E.g. Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 879-80 (9th Cir. 2002) (reversing summary judgment in favor of employer where airline executive accessed employee's password-protected personal site using passwords obtained from other employees).

reasonable expectation of privacy with regard to the use of employer-provided equipment and services.

For example, in *Holmes v. Petrovich*,[4] the court found that emails sent by an employee to her attorney using a work computer and work email account were not privileged because they were not private. The employer's computer usage policy unambiguously stated that company technology should be used only for company business; that employees were prohibited from sending or receiving personal emails using company email or computers; that employees had no right to privacy for personal information created on company computers; that emails utilizing company email were not private communications; that the employer reserved the right to inspect all files and/or emails at any time; and that the company would periodically monitor technology resources for compliance with company policy. In rejecting the employee's claim of privilege, the appellate court described the employee's conduct in communicating with her counsel via company-provided email as "akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him."[5]

In a slightly different scenario, the attorney-client privilege was upheld with respect to attorney-client communications created or received on an employee's work computer where the computer was used to access a password protected, personal web-based email account. In *Stengart v. Loving Care Agency, Inc.*,[6] the court said the emails would have retained their privileged nature even if the employer had a policy against use of company computers for personal purposes because the communications were sent through a personal, password-protected email account.

Court decisions regarding waiver of the attorney-client privilege with respect to email communications sent via employer-provided computers and/or email service are typically fact-specific. Nevertheless, employers can best protect their interests by adopting policies and procedures designed to eliminate any expectation of privacy with respect to the use of company-provided computers, internet connections, and email services. Employees can best protect the attorney-client privilege by avoiding the use of any such services when communicating with their lawyer.

C. Employer Access of Employees' Private Web Accounts

Employees have a privacy interest in private, password protected web accounts. For example, in 2010, a federal district court in New Jersey found that the defendant restaurant had violated the federal Stored Communications Act and parallel state law provisions because of the manner in which it obtained access to a password protected MySpace site on which employees commented about their experiences while working at the restaurant.[7] A server at the restaurant created a MySpace.com group to let employees "vent" about their experience working at the restaurant. A password was required to enter and view comments on the site. When a manager heard about the group page, he asked a hostess for her personal login information, which she

[4] 119 Cal. Rptr. 3d 878 (3rd Dist 2011).
[5] *Id.* at 896-97; *see also Scott v. Beth Israel Med. Ctr., Inc.*, 847 N.Y.S.2d 436, 441-43 (N.Y.Sup.Ct. 2007) (attorney-client privilege did not exist where a company computer was used to send emails, and company policy prohibited the personal use of emails, warned that they were not private, and stated they could be monitored).
[6] 990 A.2d 650 (N.J. 2010).
[7] *Pietrylo v. Hillstone Rest. Group*, 2009 U.S. Dist. LEXIS 88702 (D.N.J. 2009).

provided. The manager made no threats or comments about what would happen if the hostess refused his request, but she testified that she thought she would have gotten in trouble if she had refused. The company terminated the plaintiffs based on comments on the site. A jury found that the restaurant had violated the SCA in the way that it had gained access to the site.

D. Policing Employee Social Media Conduct

Employers should be aware that the National Labor Relations Board has taken the position that discussions by employees on social media can constitute "protected concerted activity" under the National Labor Relations Act when those discussions involve the terms and conditions of employment among fellow employees. This is true even though the employees involved are not members of a union. In a January 25, 2012 report issued by NLRB Acting General Counsel Lafe Solomon, the NLRB underscored two main points regarding the NLRA and social media:

- "Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees."[8]

For example, with respect to social media policies, the NLRB has determined that an employer's policy prohibiting employees from posting pictures of themselves in any media which depict the company in any way, including while wearing a company uniform or corporate logo, violates the NLRA because it would prohibit an employee from engaging in a protected activity, such as posting a picture of employees carrying a picket sign depicting the company's name or wearing a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment. The NLRB has also determined that policies prohibiting employees from making disparaging comments about their employer or the employee's superiors, coworkers, and/or competitor, prohibiting "inappropriate discussions," and prohibiting "offensive conduct" and "rude or discourteous behavior" were unlawful where the policies contained no limiting language to inform employees that it did not apply to Section 7 protected activity.

With respect to employee comments and discussions on social media, the test for determining whether the activity is concerted activity is whether the activity is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Concerted activity can also include circumstances where individual employees seek to initiate, induce, or prepare for group action and where individual employees bring group complaints to management's attention. Individual gripes about work that are not made in connection with group activity among employees do not constitute concerted activity. Thus, when employees engaged in discussions on Facebook about shared concerns over the manner in which their employer was withholding taxes from their paychecks, and one employee had, prior to the Facebook discussion, brought the concern to the attention of management, the NLRB concluded that such activity embodied group complaints, contemplated future group activity, and therefore was protected concerted activity.

[8] *See* The NLRB and Social Media, found at www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

In contrast, the NLRB concluded that a bartender had not engaged in concerted activity when he posted comments about his employer's tipping policy. The employer, a restaurant and bar, had an unwritten policy that waitresses did not share their tips with bartenders even though the bartenders helped waitresses serve food. The bartender in question had a conversation with a fellow bartender about the policy in the fall of 2010, but neither they nor any other bartender ever raised the issue with management. Several months later, in a conversation on Facebook, a relative asked the bartender how his night at work had gone. The bartender responded by complaining that he had not had a raise in five years and that he was doing waitresses' work without tips. He also called the restaurants customers "rednecks" and said he hoped they choked on glass as they drove home drunk. The bartender did not discuss his posting with any of his fellow employees, and none of them responded to it. The bartender was fired because of his Facebook posting about the employer's customers.

The NLRB concluded that, although the Facebook posting addressed terms and conditions of the bartender's employment, he had not engaged in concerted activity because he did not discuss the posting with his coworkers, none of them responded to the posting, and there had been no employee meetings or any attempt to initiate group action concerning the tipping policy or raises. The NLRB also found that the Facebook conversation did not grow out of the employee's conversation with his fellow bartender several months earlier.

The NLRB Office of General Counsel has issued three reports concerning social media cases since August 2011. These reports discuss social media cases decided by the NLRB, including the analysis utilized by the NLRB in determining whether various conduct by and/or policies of employers violated the National Labor Relations Act. The reports should be required reading for employers whose policies purport to address social media use by their employees.[9]

E. Video Surveillance of Employees

Video surveillance is common in the workplace. There are several legitimate reasons that employers conduct video surveillance. It can be used to monitor worker productivity; to provide security; and to deter theft, drug use, and other improper or illegal conduct. Video surveillance can also be a valuable investigative tool.

In general, there is no federal law that prohibits or regulates video surveillance in the workplace either with or without employees' knowledge or consent. There is, however, potential liability that can arise from video surveillance. For example, video surveillance that captures audio may violate the federal Wiretap Act, 18 U.S.C. §§2510 *et seq*. In general, the Wiretap Act prohibits the intentional interception of any wire, oral, or electronic communications. Capturing an employee's telephone conversation by way of video surveillance that captures audio may violate the Wiretap Act. Audio recordings may also violate state wire tap or eavesdropping laws. Most states have wire tap and/or eavesdropping laws that may be implicated by audio recording of employees.[10]

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[9] Links to the reports can be on the NLRB website at http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies.

[10] The Society for Human Resource Management provides a good summary of such laws at http://www.shrm.org/legalissues/stateandlocalresources/stateandlocalstatutesandregulations/documents/state%20surveillance%20and%20monitoring%20laws.pdf.

Video surveillance in areas in which employees have a reasonable expectation of privacy can give rise to invasion of privacy claims. Courts generally analyze invasion of privacy claims involving video surveillance by balancing an employee's reasonable expectation of privacy, if any, against an employer's legitimate business interests in conducting surveillance. Courts consider whether an employee has a subjective expectation of privacy, whether that subjective expectation is objectively reasonable, and whether that expectation is one which society would generally want to preserve. Factors considered in this inquiry include what notice, if any, an employer gives its employees and where in the workplace the surveillance is conducted. Generally, the more public the area under surveillance the more diminished is an employee's expectation of privacy. In general, an employee's expectation of privacy increases as the employee moves from the employee parking lot, into the employer's building, and then into a cubicle or private office. Courts also consider the legitimacy of the employer's business interests in conducting the surveillance, such as security and monitoring worker productivity. With public employers, courts must ensure that the employer complies with the Fourth Amendment proscription against unreasonable searches and seizures.

For example, in *Vega-Rodriguez v. Puerto Rico Telephone Co.*,[11] a quasi-public telephone company installed video cameras to monitor a large, open work area and to view all traffic passing through the main entrance of their building. Employees were notified of the camera installation. The court held that unconcealed video surveillance in a worker's common area did not violate the worker's privacy rights, especially given that the phone company disclosed its use of surveillance cameras.

In *Cowles v. State*,[12] the Alaska Supreme Court held that a box office manager had no reasonable expectation of privacy in a university's theater box office where the manager's desk could be seen by the public through the ticket window and by other employees circulating in the area behind the box office. The court reasoned that, where a person's activities are open to public view, then surveillance for the purpose of detecting employee misconduct does not violate the Fourth Amendment. The court also reasoned that when an individual is employed in a situation with high security requirements, such as handling large amounts of cash, it is less reasonable to assume their conduct on the job will be private.[13]

Courts have also recognized a reasonable expectation of privacy in an employee's exclusive private office, desk, and even file cabinets containing personal matters not shared with other employees.[14] Employers should not conduct video surveillance of locker rooms and bathrooms. These areas are generally recognized by courts as areas in which employees have a reasonable expectation of privacy.[15]

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[11] 110 F.3d 174 (1st Cir. 1997).
[12] 23 P.3d 1168 (Ak. 2001).
[13] *See also Nelson v. Salem State College*, 446 Mass. 525 (2006) (holding that employee videotaped on hidden cameras changing clothes in her cubicle after working hours has no reasonable expectation of privacy in that workspace).
[14] *See e.g. O'Connor v. Ortega*, 480 U.S. 709, 718-719 (1987) (holding that employee had a reasonable expectation of privacy in his desk and file cabinets because he did not share them with other workers, he used them to store personal materials, and his employer had no policy discouraging employees from storing personal items there); *United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991) (holding that employee had a reasonable expectation of privacy in a private office that was not open to the public and was not regularly visited by other employees).
[15] *See e.g. Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422 (8th Cir. 1991) (recognizing that models videotaped while changing clothes in a makeshift dressing area during a fashion show had a cause of action for invasion of privacy).

Employers should always check the laws of the states in which they operate. Some states have specific laws restricting where, how, and why employers may videotape employees. For example, California prohibits employers from making audio or video recordings of employees in any restroom, locker room, or other room designated by the employer for changing clothes, absent a court order. Connecticut has a similar restriction. Connecticut also requires employers to give written notice to employees prior to engaging in electronic monitoring.

Employers of union workers should note that video surveillance of union members may be the subject of mandatory bargaining. The National Labor Relations Board requires employers to bargain with unions for the right to use hidden surveillance.[16]

To minimize liability for invasion of privacy arising from the use of video surveillance, employers should consider taking the following measures:

- Identify and document the business reasons for utilizing surveillance cameras (*e.g.* security, theft prevention, safety monitoring, workplace productivity);

- Give advance notice to employees of the use of surveillance and educate employees on the reasons for surveillance;

- Inform employees in writing of areas that employees should not expect to be private;

- In written policies, reserve the right to monitor the workplace with visible and hidden cameras;

- Obtain written acknowledgement of surveillance policies from employees;

- Limit the use of cameras to times necessary to achieve the business purpose of the surveillance;

- Limit who can review the surveillance tapes to those with a "need to know;"

- Do not put cameras in bathrooms, lockers, or other areas in which employees have a reasonable expectation of privacy;

- For union shops, ensure that surveillance has been addressed as part of the collective bargaining process.

[16] *See Colgate-Palmolive Co. & Local 15, Int'l Chem. Workers Union* 323 N.L.R.B. 515 (1997); *see also Brewers and Maltsters, Local Union No. 6 v. NLRB*, 414 F.3d 36, 39 (D.C. Cir. 2005) (holding that employer's use of hidden cameras to surveil union employees was a mandatory subject of collective bargaining); *National Steel Corp. v. NLRB*, 324 F.3d 928 (7th Cir. 2003) (upholding NLRB decision establishing employee surveillance as a mandatory subject of collective bargaining).

F. GPS and RFID Tracking of Employees

Global Positioning Systems ("GPS") and Radio Frequency Identification Systems ("RFID") are two monitoring technologies that some employers utilize to track employee movement and productivity. GPS utilizes satellites in geosynchronous orbits to locate GPS receivers to within 1 meter, horizontally, of their actual location. GPS systems can be used to track company owned vehicles and company issued cell phones. RFID tags contain information (such as an identifying number) that can be queried by two-way radio transmitter-receivers. They are commonly used in electronic access key-cards and in chips implanted in pets so that they can be identified if lost. RFID tags can also be used to track employees' locations. For example, workers on offshore oil and gas platforms often wear RFID tags as a safety measure, so that they can be quickly located in emergencies.

There are currently no federal statutes addressing GPS or RFID tracking of employees. At least three states have laws prohibiting the forced implantation of RFID tags in humans. Few states have statutes addressing GPS tracking devices. Texas and California have statutes making unlawful the placement of a GPS device on a vehicle without the owner's consent.[17] These statutes do not bar employers from installing GPS devices on employer-owned vehicles. Louisiana has a statute that prohibits the use of a tracking device to determine an employee's location or movement without the employee's consent.[18]

Due to the scarcity of statutes specifically addressing GPS tracking, the permissible boundaries of GPS tracking are generally analyzed in terms of the reasonable privacy expectations of employees. Employers who notify employees that a GPS device may monitor their movements at all times may make it more difficult for employees to satisfy a court that they had a reasonable expectation of privacy while being tracked with a GPS device.

Even in the absence of state statutes addressing GPS tracking, employers should carefully consider other statutes that may impact their use of GPS monitoring. For example, a Connecticut statute requires every employer who engages in any type of electronic monitoring to give prior written notice to all affected employees informing them of the types of monitoring that may occur. Because of the breadth of the statutory language, the statute could be construed to apply to GPS tracking of employees.

II. FIREARMS IN THE WORKPLACE

Historically, owners of private property have had control over activities that take place on their property. That is changing, fairly rapidly, at least with respect to the right of employees to bring guns onto their employers' property. Approximately nineteen states have adopted legislation in the past ten years addressing the right of gun owners to bring guns onto the property of their employers. Most of these laws recognize an employee's right to store a lawfully possessed firearm in her locked personal vehicle when it is parked on the employer's premises. The details of these laws vary from state to state.

[17] Calif. Penal Code Section 637.7; Tex. Penal Code § 16.06.
[18] La. Rev. Stat. 14:323.

Employers need to be aware of gun laws that apply in the states in which they operate. Some of these laws impose criminal or civil liability on an employer for improperly refusing to allow employees to exercise the rights granted by the legislation.

There are no state laws authorizing employees to carry weapons into the workplace (other than in the parking lot). Generally, employers can prevent employees from carrying guns in the workplace. In some states, however, it is necessary to post a notice in order to preclude weapons in the workplace. *E.g.* Kansas (business owners and employers must post signs if they desire to restrict or prohibit persons from carrying concealed handguns within their buildings)[19]; Kentucky (employers and property owners may prohibit concealed weapons if they post signs identifying the prohibition)[20]; Minnesota (any policy prohibiting the possession of lawful firearms must be posted in a conspicuous sign at every entrance specifying that firearms are banned on the premises)[21]; Mississippi (employers may prohibit weapons in the workplace (other than parking lots) if employer posts a notice clearly readable from 10 feet away stating that carrying concealed firearms is prohibited)[22]; Missouri (employer may prohibit the carrying of concealed handguns on their property by posting signs)[23]; Nebraska (employer may prohibit anyone with a concealed firearm permit from bringing a weapon into the workplace; if workplace is open to the public, the employer must post a notice or specifically request the permit holder to remove the handgun from the premises)[24].

Alaska, Arizona, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Texas, Utah, and Wisconsin each have enacted laws that preclude employers from prohibiting employees from possessing a firearm in a motor vehicle or from storing a lawfully possessed firearm in a personally owned motor vehicle while parked at an employer's parking lot.[25] The details of the laws vary from state to state. Some states, *e.g.* Georgia, Indiana, Maine, and Utah, require that weapons be locked in employee vehicles and out of site. Others, such as Alaska, Arizona, Florida, Kansas, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, and Texas, do not require the weapon to be out of site. Some states expressly authorize employers to prohibit firearms in vehicles owned or leased by the employer.[26]

In a few states, employers that have restricted parking lots can ban firearms from those lots under certain circumstances. In Louisiana, for example, an employer can prohibit the storage of weapons in employees' vehicles in parking areas to which access is limited, such as by a fence or gate, provided the employer provides temporary storage for unloaded firearms or an alternative parking area, close to the main parking area, where employees can store firearms in

[19] Kan. Stat. Ann. § 75-7c11(2).
[20] Ky. Rev. Stat. Ann. § 237.106(17).
[21] Minn. Stat. § 624.714(17).
[22] Miss. Code Ann. § 45-9-101(13).
[23] Mo. Rev. Stat. § 571.107(15).
[24] Neb. Rev. Stat. § 69-2441(1), (2).
[25] Alaska Stat. 18.65.800(a); Ariz. Rev. Stat. § 12-78(A); Fla. Stat. § 790.251(4)(a); Ga. Code Ann. § 16-11-135(b); Ind. Code §§ 34-28-7-2, 34-28-8-9; Kan. Stat. Ann. § 75-7c11(1); Ky. Rev. Stat. Ann. § 237.106(1); La. Rev. Stat. Ann. § 32:292.1(A), (C); Me. Rev. Stat. tit. 26 § 600; Minn. Stat. § 624.714(18); Miss. Code Ann. § 45-9-55(1); Mo. Rev. Stat. § 571.107(15); Neb. Rev. Stat. § 69-2441(3); N.D. Cent. Code § 62.1-02-13; Okla. Stat. Ann. tit. 21, §§ 1289.7a, 1290.22(B); Tex. Labor Code § 52.061; Utah Code Ann. § 34-45-103; Wis. Stat. § 943.13(1m)(c)(2).
[26] *E.g.* Alaska Stat. § 18.65.800(d); Mo. Rev. Stat. § 571.107(15); N.D. Cent. Code § 62.1-02-13(6)(3).

their locked vehicles.[27] Arizona has a similar provision.[28] By contrast, under Mississippi law employers can prohibit employees from transporting or storing firearms in their vehicles in parking areas to which public access are restricted.[29]

Some states prohibit employers from searching private vehicles on their property for firearms or from inquiring whether firearms are present in employees' vehicles.[30] Some states also prohibit employers from conditioning employment decisions on whether an applicant has a permit to carry a firearm or an agreement by the applicant to forego her rights to possess, transport, store, or use a firearm.[31]

Because laws governing firearms in the workplace vary from state to state, employers are well advised to be familiar with the laws in the states in which they operate. Employers should also ensure that any policies governing firearms in the workplace are adapted to and comply with the laws in the individual states in which they operate.[32]

III. GENDER IDENTITY DISCRIMINATION

A. The distinction between "gender" and "sex"

Title VII identifies "sex" but not "gender" as a protected class immune from adverse employment actions and decisions. Courts, faced with claims of "gender" discrimination have struggled with the two concepts. Gender discrimination claims often arise when persons seek to conduct themselves in accordance with their gender identity rather than their biological gender. Gender identity is generally defined as a person's subjective sense of their own gender, which may be different from their biological gender. For example, some individuals self-identify as male even though biologically (and anatomically) they are female. The difficulty of adequately defining and differentiating between "sex" and "gender" has contributed to a split among federal and states courts determining whether Title VII prohibits discrimination against transgendered individuals.

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[27] La. Rev. Stat. Ann. § 32:292.1(D)(3).
[28] Ariz. Rev. Stat. § 12-781(C)(3).
[29] Miss. Code Ann. § 45-9-55(2).
[30] *E.g.* North Dakota (N.D. Cent. Code § 62.1-02-13(1)(b) (2011) (prohibiting searches and inquiries); Florida (Fla. Stat. § 790.251(4)(b) (2012) (prohibiting searches and inquiries); Georgia (Ga. Code Ann. § 16-11-135 (2012) (prohibiting searches unless done by law enforcement pursuant to a valid search warrant or unless a reasonable person would believe accessing the vehicle was necessary to prevent an immediate threat to human health, life, or safety).
[31] *See e.g.* Fla. Stat. § 790.251(4)(c); Ind. Code § 34-28-6(2); N.D. Cent. Code § 62.1-02-13(1)(c).
[32] The NRA maintains a website that contains a summary of state gun laws. http://www.nraila.org/gun-laws/state-laws.aspx. Another good resource for summary of state gun laws can be found at http://www.handgunlaw.us/.

B. Background

Federal district and appellate courts initially adopted the approach that sex is distinct from gender and that Title VII bars discrimination based on the former, but not the latter. More specifically, "the term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity," or socially-constructed characteristics.[33] "The word 'gender' has acquired the new and useful connotation of cultural attitudinal characteristics (as opposed to physical characteristics) distinctive of the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male."[34] According to this interpretation, transgender individuals, whose outward behavior and/or appearance and inward identity do not conform to social definitions of masculinity or femininity, are victims of gender, rather than sex discrimination, and are not protected by Title VII. As discussed below, this initial approach to gender discrimination changed after the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

C. Conflict among circuit courts in affording Title VII protections to transgender individuals

The Supreme Court has yet to decide whether Title VII prohibits discrimination against transgender individuals. In 1989, the Court endorsed a "gender stereotype" theory of discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) and held that Title VII prohibits not only discrimination based on an individual's biological sex, but also discrimination based on a "sex stereotype" derived from preconceived notions of how a man or a woman should behave. In finding that Price Waterhouse discriminated against Hopkins, a woman whom some Price Waterhouse partners considered to be too masculine (or not sufficiently feminine), the Court reasoned, "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[35]

The First, Sixth, Ninth, and Eleventh Circuits have held that, under *Price Waterhouse*, Title VII prohibits discrimination against a transgender individual based on a "gender stereotype" theory of discrimination. The Seventh and Tenth Circuits have not extended Title VII protections to transgender individuals. The remaining circuits have not yet addressed the issue.

Sixth Circuit. In *Smith v. City of Salem, Ohio*,[36] Smith, a transsexual, filed suit after being informed of the City's plan to terminate him. Relying on *Price Waterhouse*, the Sixth Circuit held that discrimination against a transgender individual because of his or her gender non-conformity is gender stereotyping prohibited by Title VII and the Equal Protection Clause. This is so because Title VII's reference to "sex" encompasses both the biological differences between men and women and gender discrimination, *i.e.*, discrimination based on a failure to conform to stereotypical gender norms.

Ninth Circuit**.** Before *Price Waterhouse*, the Ninth Circuit held that Title VII does not protect transgendered individuals because Congress did not intend to expand the word "sex"

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[33] *Dobre v. Amtrak*, 850 F. Supp. 284, 286 (E.D. Pa. 1993); *see also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157, n. 1 (1994) (Scalia, J., dissenting).
[34] *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 172, 157, n. 1 (1994) (Scalia, J., dissenting).
[35] *Id.*
[36] 378 F.3d 566, 572-74 (6th Cir. 2004).

beyond its traditional definition based on anatomical characteristics.[37] Therefore, the prohibition against sex discrimination in employment exists to require employers to treat biological men and women equally, not to protect transgendered persons.[38] After *Price Waterhouse*, the Ninth Circuit concluded that the terms "sex" and "gender" are interchangeable for purposes of Title VII analysis.[39] Thus, disparate treatment due to an individual's transgendered status can constitute sex discrimination under Title VII.[40]

Eleventh Circuit. In *Glenn v. Brumby*,[41] Glenn, a male to female transsexual, was fired by the Georgia General Assembly's Office of Legislative Counsel. In concluding that Glenn could assert a claim under the Equal Protection Clause, the court made the ancillary observation that under *Price Waterhouse*, "there is ... a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms . . . ."[42] Accordingly, under Title VII "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination."[43]

First Circuit. In *Rosa v. Park West Bank & Trust Co.*,[44] the First Circuit held that a transgender plaintiff may claim sex discrimination based on his or her non-conformity with gender stereotypes.

Seventh Circuit. In *Ulane v. Eastern Airlines, Inc.*,[45] which was decided before *Price Waterhouse*, the Seventh Circuit Court of Appeals concluded that discrimination against a transgender airline pilot does not fall within the ambit of Title VII. The court narrowly defined "sex" as a biological construct distinguished by the presence of chromosomes and other physical traits generally correlative with one's sex. The court reasoned that absent Congressional intent or action to the contrary, Title VII protects only those who are discriminated against for being biologically male or biologically female. Ulane, however, was discriminated against for being a transsexual.

After *Price Waterhouse*, the Seventh Circuit has not reconsidered gender identity discrimination claims under Title VII, but it has affirmed its prior holding that Title VII prohibits only discrimination based on "sex" defined as a "biological male or biological female," and not one's sexuality or sexual orientation.[46]

Tenth Circuit. In *Etsitty v. Utah Transit Auth.*,[47] which was decided after *Price Waterhouse*, the Tenth Circuit concluded that, in light of the traditional binary conception of sex and the plain language of Title VII, discrimination because of a person's status as a transsexual is not sex discrimination. The court acknowledged that a number of courts have relied on *Price Waterhouse* to recognize a Title VII claim based on an employee's failure to conform to

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[37] *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).
[38] *Id.*
[39] *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).
[40] *Id.*
[41] 663 F.3d 1312 (11th Cir. 2011).
[42] *Id.* at 1316.
[43] *Id.* at 1317.
[44] 214 F.3d 213, 215-16 (1st Cir. 2000).
[45] 742 F.2d 1081, 1086-87 (7th Cir. 1984).
[46] *See Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000).
[47] 502 F.3d 1215, 1218 (10th Cir. 2007).

stereotypical gender norms.[48] However, without deciding that issue, the court held that plaintiff had failed to present a genuine issue of material fact as to whether the employer's motivation for her termination was pre-textual.[49]

Other Circuits. In *Dawson v. Bumble & Bumble*,[50] the court recognized that gender stereotype claims present problems for an adjudicator because stereotypical notions of how men and women should behave will blur into ideas about heterosexuality and homosexuality. Plaintiff, a self-described lesbian female, failed to show that her harassment was due to her failure to conform to gender stereotypes.[51]

D. Split among district courts in affording Title VII protections to transgender individuals

District courts permitting Title VII claims by transgendered individuals

A number of federal district courts have recognized that Title VII claims may be brought by transgendered individuals. *See, e.g., Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*,[52] ("Title VII and Price Waterhouse . . . do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and [a] 'macho' female who . . . is perceived by others to be in nonconformity with traditional gender stereotypes."); *Schroer v. Billington*,[53] ("A transsexual plaintiff might successfully state a *Price Waterhouse*-type claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer . . . , but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions."); *Mitchell v. Axcan Scandipharm*[54], (holding that a transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"); *Kastl v. Maricopa Cnty. Comm. College*[55], ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait."); *Tronetti v. Healthnet Lakeshore Hosp.*[56], (holding that transsexual plaintiff may state a claim under Title VII "based on the alleged discrimination for failing to 'act like a man'"); *Morales v. ATP Health & Beauty Care, Inc.*[57], (transgender plaintiff properly alleged that she was a member of a protected class under Title VII but her claim was not actionable because the alleged harassment was not pervasive enough).

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[48] *Id*. at 1224.
[49] *Id.*
[50] 398 F.3d 211, (2d Cir. 2005).
[51] *See also Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (gay male plaintiff had no claim under Title VII because "he did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave").
[52] 542 F. Supp. 2d 653, 659-61 (S.D. Tex. 2008).
[53] 424 F. Supp. 2d 203, 211 (D.D.C. 2006).
[54] No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *5 (W.D. Pa. Feb. 21, 2006).
[55] No. 02-1531, 2004 U.S. Dist. LEXIS 29825, at *8-9 (D. Ariz. June 3, 2004).
[56] No. 03-CV-0375E, 2003 U.S. Dist. LEXIS 23757, at *13 (W.D.N.Y. Sept. 26, 2003).
[57] No. 3:06CV01430, 2008 U.S. Dist. LEXIS 63540, at *21-23 (D. Conn. Aug. 18, 2008).

District courts rejecting Title VII claims by transgendered individuals

In rejecting discrimination claims by transgender or transsexual plaintiffs, several district courts have either distinguished *Price Waterhouse* or have not found evidence that the employer actually relied on gender stereotypes to make an adverse employment decision. *See, e.g., Creed v. Family Express Corp.*[58], (concluding that *Price Waterhouse* did not extend to sex-specific dress code and grooming policy); *Oiler v. Winn-Dixie La., Inc.*[59], (distinguishing *Price Waterhouse* on the basis that "[t]he plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man . . . ."); *James v. Ranch Mart Hardware, Inc.*[60], ("Plaintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII."); *Dobre v. National Railroad Passenger Corp.*[61], ("Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism.").

E. State Legislation

States prohibiting gender discrimination and providing a private right of action

California, Colorado, Connecticut, the District of Columbia, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington prohibit gender discrimination in certain circumstances and provide a private right of action for such discrimination. The protections afforded by these states vary. For example, Nevada's law bans discrimination in employment, housing, and public accommodation while Maine's law covers those categories plus credit and education.

In 2003, California amended its Gender Nondiscrimination Act to prohibit employers from discriminating on the basis of gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. In 2011, Connecticut passed An Act Concerning Discrimination, which prohibits discrimination in public and private employment based on gender identity and expression. Under the act, "gender identity or expression" means a person's gender-related identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from those traditionally associated with the person's physiology or assigned sex at birth.

In 2006, the District of Columbia city council amended the Human Rights Clarification Amendment Act of 2005 (D.C. Law. 16-58) to prohibit discrimination based on "sexual orientation, gender identity or expression". In addition, Chapter 8 was added to Title 4 of the District of Columbia's Municipal Regulations which extended protection of gender identity or expression in housing, education, employment, and agencies of the D.C. government.

States Prohibiting Gender Identity Discrimination Without a Private Right of Action

Several states, including Delaware, Indiana, Kansas, Kentucky, Michigan, and Pennsylvania, prohibit gender identity discrimination in specified situations but have not created

[58] No. 3:06-CV-465, 2009 U.S. Dist. LEXIS 237, at *21-27 (N.D. Ind. Jan. 5, 2009).
[59] 2002 U.S. Dist. LEXIS 17417, at *29 (E.D. La. Sept. 16, 2002).
[60] 1994 U.S. Dist. LEXIS 19102, at *2 (D. Kan. Dec. 23, 1994).
[61] 850 F. Supp. 284, 286-87 (E.D. Pa. 1993).

a private right of action for such discrimination. For example, in Delaware, Gov. Jack Markell signed Executive Order Number Eight, which extended gender identity expression protections to executive branch employees. The Order stressed that the work atmosphere in the executive agencies should be one of mutual respect and understanding among persons of diverse backgrounds, including gender identity or expression. However, no private right of action was provided.

For a good summary of state laws regarding gender identity discrimination *see A State-by-State Examination of Nondiscrimination Laws and Policies*, Center for American Progress.[62]

F. City and County Ordinances

In the absence of state and federal legislation prohibiting gender identity discrimination, a number of cities and counties have passed legislation addressing gender identity. According to the Human Rights Campaign, as of November 1, 2013, at least 190 cities and counties prohibit employment discrimination on the basis of gender identity in employment ordinances that govern all public and private employers in those jurisdictions.[63]

By way of example, although the state of New York does not explicitly prohibit gender identity discrimination, twelve local ordinances and an executive order that applies only to state employees do. The local ordinances provide a patchwork of protections under state and local law that vary in scope and provide different remedies.[64] Seven cities and three counties in New York have enacted local ordinances prohibiting discrimination based on gender identity in at least some private sector areas, such as private sector employment, housing, and public accommodations. All seven cities, three counties, and two towns prohibit employment discrimination in the public sector based on gender identity. Two counties, Suffolk and Westchester, also prohibit discrimination in public education, but none of the counties extend protection from discrimination to other government services.

In 2009, an executive order was signed by Governor David Paterson banning discrimination in state employment on the basis of gender identity. The order covers only employees of the state executive branch. The order directs the Office of Employee Relations to "implement a procedure to ensure the swift and thorough investigation of complaints," but the order does not specify the remedies available to employees who have experienced discrimination. *See* N.Y. Exec. Order No. 33 (Dec. 16, 2009).

In Texas, six cities – Dallas, Fort Worth, Austin, El Paso, Houston, and San Antonio – prohibit gender identity discrimination, although the scope of protection and remedies available vary from city to city.[65]

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[62] Available at: http://www.americanprogress.org/issues/2012/06/pdf/state_nondiscrimination.pdf.
[63] For a list of the cities and counties, *see* https://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender.
[64] *See generally* http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Liebowitz-NY-local-laws-Jun-2013.pdf.
[65] *See* http://www.hrc.org/resources/entry/cities-and-counties-with-non-discrimination-ordinances-that-include-gender.

G. Impact on Employers

In light of the foregoing, what is an employer to do? A clear split exists among federal and state courts and legislatures, as well cities in extending Title VII rights to transgender and transsexual individuals. Public and private sector employers and human resource professionals should vigilantly monitor developments in this area and ensure that supervisors and other employees are aware of the need to avoid stereotyping employees based on traditional conceptions of how men and women should act, speak, talk, or dress. The same care should be taken throughout the interview, hiring, evaluation, and termination process. Employers should also be aware of the laws of their state and local municipalities, which are increasingly adding "gender identity" as a protected class of employees.

H. Practical problems: restroom use by transgender individuals

Restroom use is a common and recurring problem for transgender individuals in the workplace. In general, these individuals prefer to use the restroom consistent with their gender identity. Determining how employers should deal with the issue is not easy. The simplest solution, but one that is not always feasible, is for the employer to provide gender neutral restroom facilities. Such facilities are becoming more and more commonplace in public facilities. In those situations in which employers are unwilling or unable to provide gender neutral restroom facilities, the solution is not easy. If an employer permits transgender employees to use the restroom of their choice, there are potential repercussions from non-transgender employees who may object to sharing a restroom with employees of a different sex. If an employer refuses to permit transgender employees to use the restroom of their choice, is there potential liability for gender identity discrimination?

Very few courts have considered this issue. However, absent controlling statutes or ordinances that guarantee transgender individuals the right to use the restroom that is consistent with their sexual identity, the prevailing opinion appears to be that, even where gender identity discrimination is unlawful, it is not unlawful to require a transgender individual to use the restroom consistent with that individual's sex.[66] However, according to the ACLU, some jurisdictions (Colorado, Iowa, San Francisco, New York City, and the District of Columbia) have determined that denying transgender people the right to use a gender identity appropriate restroom violates nondiscrimination laws.[67] In particular, Washington's Human Rights Commission states that "transgender employees should be permitted to use the restroom that is consistent with the individual's gender identity." Other jurisdictions make clear that transgender people cannot be required to prove their gender to gain access to a public bathroom, unless everyone has to show ID to use that bathroom. Still other jurisdictions (*e.g.*, Chicago) continue to

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[66] *See Goins v. W. Grp.*, 635 N.W. 2d 717 (Minn. 2001) ("the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender."). *See also Etsitty*, 502 F.3d at 1221-22 ("However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes."); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 45-46 (N.Y. App. Div. 2005) (holding that in a non-workplace context, it is not sex discrimination for a building owner to prevent transgender people from using gender-identity-appropriate restrooms in a building housing several businesses); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (stating that the transgender community is not protected under Title VII when employers forbid transgender plaintiffs from using women's restrooms).

[67] *See* https://www.aclu.org/lgbt-rights/know-your-rights-transgender-people-and-law.

allow businesses to determine whether a transgender patron is given access to the male or female bathroom based on the gender on his or her ID.

IV. SAME-SEX HARASSMENT AND DISCRIMINATION BASED ON SEXUAL STEREOTYPING

A. Background

Prior to the Supreme Court's decision in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), several courts had refused to recognize same-sex sexual harassment claims as being at odds with Congressional intent to bar sex discrimination resulting from "the exploitation of a powerful position to impose sexual demands or pressures on an unwilling but less powerful person."[68] These courts reasoned that in an all male workplace, for example, there would be insufficient evidence of exploitation or an anti-male environment to support a discrimination action.[69]

This disagreement concerning the viability of same-sex sexual harassment was resolved, in part, by *Oncale*. There, the Supreme Court held there was no justification in Title VII's language or legislative history "for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."[70] As the Court reasoned, while "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . ."[71] The Court, however, offered little guidance as to how to infer same-sex sex discrimination, other than to note that courts must evaluate the objective severity of harassment by "social context," "surrounding circumstances," and "[c]ommon sense."[72]

After *Oncale*, federal district and circuits courts uniformly have decided that Title VII does not protect gay and lesbian individuals from discrimination based on sexual orientation. However, many courts have broadened the protections afforded under Title VII to encompass and prohibit gender stereotyping that results in same-sex sexual harassment. Defining the contours of same-sex harassment claims established by "gender stereotyping" has proven much more difficult and is the subject of disagreement among courts, as evidenced by the Fifth Circuit's recent decision.

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[68] *See, e.g.*, *Benekritis v. Johnson*, 882 F. Supp. 521, 525 (D.S.C. 1995).
[69] *See, e.g.*, *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988) ("The argument that Goluszek worked in an environment that treated males as inferior consequently is not supported by the record . . . . Goluszek may have been harassed 'because' he is a male, but that harassment was not of a kind which created an anti-male environment in the workplace.").
[70] 523 U.S. at 79.
[71] *Id.*
[72] *Id.* at 81-82.

B. Circuit Court Case Law

EEOC v. Boh Bros. Constr. Co., L.L.C., 731 F.3d 444 (5th Cir. 2013) (en banc)

In *Boh Bros. Constr. Co.*, the EEOC sued Boh Brothers Construction Company on a same-sex hostile work environment claim involving the superintendent of an all-male construction crew who subjected an iron worker to almost daily verbal and physical harassment.[73] For the first time, the Fifth Circuit held that same-sex harassment under Title VII is "because of sex" if it is based on lack of conformity to gender stereotypes.[74] The majority noted a broad consensus in federal courts, under the reasoning of *Oncale*, "recogniz[ing] that a plaintiff can satisfy Title VII's because-of-sex requirement with evidence of a plaintiff's perceived failure to conform to traditional gender stereotypes."[75] The court also clarified that despite *Oncale* offering three methods for establishing same-sex harassment, no one path or scenario is required to prove that same-sex harassment was motivated "because of . . . sex."[76] Moreover, the court concluded that under a gender stereotype theory of discrimination, a plaintiff need not prove that the victim of harassment actually expressed non-traditional gender traits:

> In conducting this intent-based inquiry, we focus on the alleged harasser's subjective perception of the victim. Thus, even an employer's wrong or ill-informed assumptions about its employee may form the basis of a discrimination claim. . . . We do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth; here, for example, that Woods was not, in fact, 'manly.'[77]

Recognizing that Title VII is not a general civility code for the American workplace, the court emphasized that regardless of whether opposite-sex or same-sex harassment is at issue, a plaintiff must always establish that the harasser's behavior is so objectively offensive as to alter the conditions of his or her employment.[78] In other words, conduct that is "merely tinged with offensive sexual connotations" does not amount to sex discrimination.[79]

The majority's en banc opinion drew strong dissents from Judges Grady Jolly, Edith Jones, and Jerry Smith. Concerned about the blurred distinction between "bad, boorish, and juvenile" behavior and actionable sex discrimination, Judge Jones's colorful dissent highlighted the difficulty of identifying actionable conduct in predominately male-populated worksites, such as construction sites and oil/gas fields.[80] She argued that in an all male environment, "crude sexual epithets are ubiquitous to the point of triviality" and cannot alone support an inference of the harasser's motivation to discriminate "because of sex."[81] She also asserted that the only objective way for courts or juries to infer that a same-sex harasser is acting "because of sex" is for the victim or the harasser "visibly not to conform to gender stereotype."[82] To emphasize her

[73] 731 F.3d at 449.
[74] *Id.* at 456.
[75] *Id.* at 454.
[76] *Id.* at 456.
[77] *Id.* at 456-57.
[78] *Id.* at 454-55.
[79] *Id.* at 455.
[80] *Id.* at 475.
[81] *Id.* at 477.
[82] *Id.* at 478-79.

point, Judge Jones envisioned a mock employment memorandum entitled "Etiquette for Ironworkers," setting forth company rules banning use of the phrase "man up," prohibiting anyone from making fun of male co-workers for "not being able to eat a raw jalapeño," or banning "twerking."[83] In the dissent's view, the majority failed to take into account the overall social context of an all-male construction site, where vulgar and crude language and acts were commonplace.[84]

Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006)

In *Vickers*, the plaintiff, a male police officer at Fairfield Medical Center, sued his former employer after experiencing daily harassment from his male counterparts.[85] According to the complaint, plaintiff befriended a male homosexual doctor and assisted him in an investigation regarding sexual misconduct that had allegedly been directed at the doctor.[86] Plaintiff alleged that, after finding out about the friendship, his co-workers "began making sexually based slurs and discriminating remarks and comments" about his sexuality.[87]

In evaluating plaintiff's same-sex harassment claim, the court concluded that *Price Waterhouse* creates a cause of action for sex discrimination based on an individual's failure to conform to gender stereotypes, but it rejected plaintiff's claim because he "made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way . . . ."[88] The court reasoned that the harassment at issue was more properly viewed as harassment based on plaintiff's perceived homosexuality, rather than based on gender non-conformity.[89]

Medina v. Income Support Div., 413 F.3d 1131 (10th Cir. 2005)

In *Medina*, plaintiff, a heterosexual woman, alleged that her former lesbian supervisor subjected her to a hostile work environment through unwelcome sexual conduct and comments and by showing preferential treatment towards other lesbian employees.[90] Plaintiff argued that she was discriminated against for failing to conform to gender stereotypes.[91] The Tenth Circuit recognized that in a same-sex harassment case, a hostile environment motivated by harasser's desire "to punish the plaintiff's noncompliance with gender stereotypes" would be unlawful.[92] However, in the court's view, the plaintiff's allegations of mistreatment were based on sexual orientation and her failure to act like a stereotypical lesbian, which is not prohibited by Title VII.[93]

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[83] *Id.* at 470.
[84] *Id.* at 474.
[85] 453 F.3d at 759.
[86] *Id.*
[87] *Id.* at 759.
[88] *Id*. at 763.
[89] *Id.*
[90] 413 F.3d at 1133.
[91] *Id.* at 1135.
[92] *Id*. at 1134-35.
[93] *Id.*

Nichols v. Azteca Rest. Enters., 256 F.3d 864 (9th Cir. 2001)

In *Nichols,* a male restaurant worker successfully utilized the sex-stereotyping theory of discrimination in a suit alleging that his former employer subjected him to a barrage of vulgar and gender-based insults.[94] The Ninth Circuit found that the harassment was sufficiently severe and pervasive to alter plaintiff's terms and conditions of employment, and that plaintiff, as in *Price Waterhouse,* had established that the abuse by his co-workers and supervisor reflected their belief that he did not conform to the behavior expected of a person of his sex.[95] The court reasoned that *Price Waterhouse*'s gender stereotype theory has "equal force" when a man is harassed by his male co-workers for acting too feminine.[96]

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999)

In *Higgins,* plaintiff, a gay man, asserted hostile environment and sex discrimination claims, alleging that his coworkers had bombarded him with "obscene remarks" and derogatory names on account of his sexual orientation.[97] Despite concluding that plaintiff's harassment was due to his sexual orientation, and thus not proscribed by Title VII, the court emphasized that the issue of whether same-sex harassment based on gender stereotyping is actionable is "no longer open . . . ."[98] In other words, "just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."[99]

Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1996)

In *City of Belleville,* two teenage brothers asserted same-sex sexual harassment claims against their summer employer alleging that they were the objects of myriad homophobic epithets, sexually-oriented derogatory remarks, and physical assaults.[100] The trial court granted summary judgment to the City as to the plaintiff's Title VII sexual harassment and constructive discharge claims.[101] The appellate court reversed the trial judge and ruled that plaintiffs could go to trial on their same-sex harassment claim for two reasons: (1) because the harassment had "explicit sexual overtones," plaintiffs could state a claim for sexual harassment; and (2) plaintiffs could rely on a "gender stereotype" theory of discrimination.[102] As the court reasoned, the gender stereotype theory protects effeminate men just as much as women harassed in the workplace for being perceived to be unacceptably "masculine."[103] That is, despite the historic balance of power between men and women in the workplace, Title VII does not exclude from its purview men who are sexually harassed by other men.[104]

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[94] 256 F.3d at 870.
[95] *Id.* at 874-75.
[96] *Id*. at 874.
[97] 194 F.3d at 257.
[98] *Id.* at 261 n. 4.
[99] *Id*.
[100] 119 F.3d at 566-67.
[101] *Id.* at 567.
[102] *Id.* at 571.
[103] *Id.* at 571-72.
[104] *Id.* at 572.

In *Oncale*, the Supreme Court characterized and rejected *City of Belleville*'s first ground as "suggest[ing] that workplace harassment that is sexual in content is always actionable, regardless of the harasser's sex, sexual orientation, or motivations."[105] As a result, the case was later remanded to the Seventh circuit for further consideration. Nevertheless, the decision is still widely cited for the notion that a gender stereotype theory of discrimination may support a same-sex harassment claim.[106]

Subsequently, in *Spearman v. Ford Motor Co.*,[107] the Seventh Circuit acknowledged in a same-sex harassment case that "sex stereotyping may constitute evidence of sex discrimination" but cautioned that "'remarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision.'"[108] Rather, "'the plaintiff must show that the employer actually relied on [the plaintiff's] gender in making its decision.'"[109] Relying on *Price Waterhouse* and *Oncale*, the court explained that, in evaluating a male plaintiff's hostile work environment claim under Title VII, it had to "consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole created a reasonable inference that the plaintiff was discriminated against because of his sex."[110]

Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3rd Cir. 2001)

In *Bibby*, a gay male employee alleged acts of supervisorial and co-worker harassment. The court ruled that a "plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender."[111] However, the court affirmed summary judgment for the defense due to plaintiff's failure to offer any evidence that he was harassed for failing to conform to a societal stereotype of how men should behave and appear.[112]

Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005)

In *Dawson*, the plaintiff, a self-described "lesbian female, who does not conform to gender norms" claimed that she suffered discrimination on the basis of sex, sex stereotyping, and/or sexual orientation in violation of Title VII and other state and federal statutes.[113] The court recognized that "gender stereotyping" can constitute discrimination, but denied plaintiff's claims for failing to produce substantial evidence that "Dawson was subjected to any adverse

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[105] 523 U.S. at 79.
[106] *See Boh Bros. Constr. Co.*, 731 F.3d at 261 n. 4 ("Although Boh Brothers relies on the Supreme Court's vacating of *City of Belleville* to argue that gender-stereotyping claims are unavailable to same-sex plaintiffs, we note that the Third Circuit reads the tea leaves exactly the opposite: 'Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in City of Belleville was intended to call its gender stereotypes holding into question.'") (quoting *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5. (3rd Cir. 2001)).
[107] 231 F.3d 1080 (7th Cir. 2000).
[108] *Id.* at 1085.
[109] *Id.*
[110] *Id.*
[111] 260 F.3d at 262-63.
[112] *Id.* at 265.
[113] 398 F.3d at 213.

employment consequences as a result of her appearance."[114] In doing so, the court acknowledged that "stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality."[115] Thus, plaintiffs may not "bootstrap protection for sexual orientation into Title VII."[116] The court also acknowledged that distinguishing between the failure to adhere to sex stereotypes and discrimination based on sexual orientation may be difficult, particularly in cases where a perception of homosexuality itself results from an impression of nonconformance with sexual stereotypes.[117]

C. Implications for Employers

Although same-sex harassment has been judicially recognized for over a decade, the Fifth Circuit opinion and others like it may have long reaching consequences for employers, as it links the concept of unlawful gender stereotyping to same-sex harassment claims. As a result, employers may experience an increase in gender-stereotype cases. In response, employers may want to review and revise their anti-harassment policies to specifically prohibit harassing behavior based on gender-stereotypes. However, the Fifth Circuit's decision is a reminder that simply having such a policy is not enough. The opinion is notable for its rejection of the employer's *Faragher/Ellerth* defense. The court was critical of the employer's "EEO Statement" and concluded that, while Boh Brothers had a written anti-discrimination policy, it was too generic, not properly implemented or enforced, inadequately distributed to employees, and offered no instructions on how to assert or investigate harassment complaints. The finding was reinforced by the supervisor's lack of knowledge regarding sexual harassment and evidence that he had never received formal employment discrimination training.

V. MANDATORY PAYROLL DEBIT CARDS

A payroll card is a prepaid reloadable debit card issued by employers in lieu of paper paychecks or automatic deposits. Each payday, the payroll card is electronically loaded with the full amount of the employee's net pay. Employees can access their pay in numerous ways, depending upon the features offered by the program provider, including by ATM withdrawals, PIN based transactions, and cash back features. The payroll card accounts may also include the ability to transfer money from the payroll card to a standard bank account, convenience checks that can be used for bill payment, purchase of money orders, or the ability to electronically pay bills.

Payroll cards are an important solution to employers and employees. They can provide workers who are unable to open a conventional bank account with an alternative method of payment. Employers view payroll cards as a cost-effective means of providing wages to employees who lack a traditional banking relationship.[118] Visa estimates that a business with 500 employees would save $21,000 a year by switching from checks to cards.[119]

Payroll cards are typically provided at no charge by the credit card issuers but often carry significant fees for a variety of transactions, including ATM withdrawals, in-store purchases,

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[114] *Id.* at 221.
[115] *Id.* at 218.
[116] *Id.*
[117] *Id.*
[118] *See* Electronic Fund Transfers, 71 Fed. Reg. 51437, 51438 (Aug. 30, 2006).
[119] *See* http://www.electronicpayments.org/business/direct-deposit/learn/calculator.

overdraft fees, receiving funds by check, and inactivity. The fees can be particularly burdensome for the significant number of low-wage workers who do not have bank accounts and, in some cases, for employees who are required by their employers to maintain a payroll card account.

Employers in virtually every industry have turned to payroll cards as a means to deliver wages to employees. According to the Federal Deposit Insurance Corp., nearly 10 million households, or 8.2 percent do not have traditional bank accounts and must instead rely on alternative financial institutions and check cashing services.[120] In 2012, there were 6 billion prepaid card transactions, valued at more than $140 billion.[121]

A. Legal challenges

Recently, payroll cards have been the subject of considerable scrutiny and government interest. In Pennsylvania, an employee of a McDonald's franchisee recently commenced a class action suit, claiming that the fees charged by her mandatory payroll card reduced her wages below the minimum wage. The New York state attorney general's office recently launched an investigation, asking 20 large employers, including McDonald's, Walgreens, and Wal-Mart to provide information about their payroll debit card policies and practices.

In July, over a dozen U.S. Senators sent letters to the federal Consumer Financial Protection Bureau and the U.S. Department of Labor asking the federal agencies to clarify whether current laws permit employers to require their employees to use a payroll card.

B. Electronic Fund Transfer Act

In 1978, the Electronic Fund Transfer Act ("EFTA") was enacted to provide a framework for establishing the rights, liabilities, and responsibilities of participants and consumers involved in electronic fund transfer systems and financial institutions that offer the services. The EFTA is implemented and administrated by the Board of Governors of the Federal Reserve System ("FRB") through "Regulation E," which has a primary objective of protecting individual consumers engaging in electronic fund transfers.[122] The Regulation addresses a range of issues from required notices and receipts to dispute resolution procedures and liability for unauthorized transactions.[123]

The most common types of covered transactions are those involving debit cards, direct deposits, ATM transfers, and preauthorized debits from a consumer's bank account. On July 1, 2007, the FRB made electronic "payroll cards" subject to the EFTA, by defining an "account" to include a payroll card account established directly or indirectly through an employer, and to which transfers of the consumer's salary, wages, or other employee compensation are made on a recurring basis.[124]

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[120] *See* http://www.fdic.gov/householdsurvey/2012_unbankedreport_execsumm.pdf .
[121] *See* http://www.fdic.gov/news/conferences/2013ResearchConf/Papers/Wilshusen.pdf.
[122] 12 C.F.R. 205.1(b)) (2006).
[123] 12 C.F.R. 205.7, 205.9, 205.11, 205.6 (2006).
[124] 12 C.F.R. 1005.02(b)(2) (2006).

C. CFPB Bulletin - 09/12/13

On September 12, 2013, the Consumer Financial Protection Bureau ("CFPB") issued Bulletin 2013-10 (1) prohibiting the mandatory use of payroll card accounts at an employer-selected financial institution under the EFTA; and (2) extending certain consumer protections to employees who receive wages on a payroll card.[125]

According to the CFPB, Regulation E states clearly that no "financial institution or other person" can require an employee to receive direct deposit into an account at a particular institution.[126] In 2006, the Federal Reserve Board explained that Regulation E's compulsory use provisions "apply to payroll card accounts because they are established as accounts for the receipt of [electronic fund transfers] of salary."[127] Accordingly, Regulation E bars employers from mandating that employees receive wages on a payroll card account of the employer's choosing. An employer may, however, offer employees the choice of receiving their wages on a payroll card or by some other means.

The CFPB also concluded that Regulation E's protections available to those who make electronic fund transfers through debit cards, for instance, should be extended to employees who receive wages on a payroll card. These protections include:

- disclosures of any fees imposed by the financial institution: the disclosures must be in writing and made at account opening or before the first transfer occurs, although some state laws require that certain disclosures be made before an employee elects to receive wages through a payroll card;

- access to account history: a payroll card issuer must provide either periodic statements or must provide the consumer's account balance;

- limited liability for unauthorized transfers: regulation E's limited liability protections fully apply to payroll cards; and
- error resolution rights: financial institutions must respond to a consumer's report of errors regarding a payroll card account if the report is received within 60 days of the consumer either accessing account history or receiving a written account history on which the error appears, whichever is earlier, or within 120 days after the alleged error occurs.

D. Preemption

The EFTA preempts state laws governing consumer electronic fund transfers to the extent that those laws are inconsistent with the EFTA and then only to the extent of the inconsistency.[128] A state law is not inconsistent with federal law if it offers greater protections to consumers than the EFTA.[129] The EFTA provides that the CFPB shall make a preemption

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[125] *See* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.
[126] 12 C.F.R. 1005.10(e)(2) (2006).
[127] 71 Fed. Reg. 1473, 1476 (Jan. 10, 2006).
[128] *See* 15 U.S.C. § 1693q.
[129] *See* EFTA § 922; 15 U.S.C. § 1693q, 12 C.F.R. 1005.12(b). Pursuant to Section 205.12(b)(2) of Regulation E, an inconsistent state law: (1) requires or permits a practice or act prohibited by the federal law; (2) provides for consumer liability for unauthorized electronic fund transfers that exceeds the limits imposed by the federal law; (3) allows longer time periods than the federal law for investigating and correcting alleged errors, or does not require

determination upon its own motion, or upon the request of any State, financial institution, or other interested party.

E. State laws

Dozens of states have updated their wage payment statutes and/or regulations to address the use of payroll cards. The state wage payment statutes fall into four categories: (1) statutes that allow payment by cash, check, and direct deposit only; (2) statutes that allow the employer and employee to agree to other forms of wage payment; (3) statutes that permit payment by "other acknowledgements of indebtedness"; and (4) statutes that do not regulate the method of wage payment.[130]

Sample State Statutes Governing Payroll Card Accounts

Oklahoma. On November 17, 2009, the Oklahoma Attorney General issued Opinion 09-31 concluding that the EFTA, Regulation E, and Official Staff Interpretations supplementing Regulation E prohibit an employer from requiring an employee to receive salary through a payroll card account.[131] The opinion also noted that although employers may require an employee to accept the payment of wages by direct deposit, the employer cannot require that a certain bank be used.

Connecticut. Connecticut's Department of Labor has taken the position that payroll cards are not authorized under the Connecticut wage payment statute. In 2009 and 2012, the state legislature introduced but failed to pass legislation expressly recognizing the use of payroll cards.

Minnesota. In Minnesota, legislation was passed on June 3, 2005, providing employees the option to receive wages through payroll cards.[132] Minnesota requires that the employee voluntarily consent in writing to the payroll card method of payment.[133]

Colorado SB120, section 8-4-102, enacted on March 20, 2008. "[N]othing in this article shall prohibit an employer from depositing an employee's wages on a paycard, so long as the employee: (1) is provided free means of access to the entire amount of net pay at least once per pay period; or (2) may choose to use other means for payment of wages . . . ."

Delaware Department of Labor Regulations, Delaware Admin. Code S. 65-400-013, adopted May 14, 2004. "Delaware's Wage Payment & Collections Act requires the payment of wages to employees in lawful money or checks payable on demand . . . . Employer may comply with this requirement by issuing a payroll debit card which provides the functional equivalent of cash or a check. It is the employer's responsibility to effectuate a payroll debit card system which will allow full payment of wages on the employee's regular payday and without cost to

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the financial institution to credit the consumer's account during an error investigation in accordance with § 205.11(c)(2)(i); or (4) requires initial disclosures, periodic statements, or receipts that are different in content from those required by the federal law except to the extent that the disclosures relate to consumer rights granted by the state law and not by the federal law.

[130] *See* American Payroll Association, State Recognition of Payroll Debit Cards, June 2008, available at http://info.americanpayroll.org/pdfs/paycards/apapaycardguide.pdf.

[131] *See http://www.ok.gov/odol/documents/WHAGOpinion09-31.pdf.*

[132] MINN. STAT. §§ 177.23, 177.255 (2006).

[133] *Id*. at § 177.255, subd. 6.

the employee."

Maine LD963 Chapter 89, enacted May 12, 2005. "'Wages' also includes compensation paid through a direct deposit system, automated teller machine card or other means of electronic transfer as long as the employee either can make an initial withdrawal of the entire net pay without additional cost to the employee or the employee can choose another means of payment that involves no additional cost to the employee."

Michigan SB 851, enacted January 3, 2005. "An employer or agent of an employer shall not issue a payroll debit card to an employee under subsection (1)(d) without the full, free, and written consent of the employee, obtained without intimidation, coercion, or fear of discharge or reprisal for refusal to accept the payroll debit card. . . . . An employer shall not require an employee to pay any fees or costs incurred by the employer in connection with paying wages or establishing a process for paying wages . . . ."

Texas Wage Payment Law Acts 1993, 73rd Leg., Chapter 269 S. 1, enacted September 1, 1993. The Texas Payday Law provides that employees must be paid in one of four forms: (1) U.S. currency; (2) by written instrument issued by the employer and negotiable on demand at full face value of U.S. currency; (3) by electronic funds transfer; or (4) any other kind or form agreed to in writing by the employee. Tex. Lab. Code § 61.016. The Texas Workforce Commission has advised that this provision applies to payroll cards and that employers can pay their employees using payroll cards so long as the employees agree in writing and the use of the card does not result in any fee charged to the employee.[134]

F. Implications for Employers

Employers that participate in a payroll card payment plan should ensure that their policies and procedures comply with federal statutes and regulations, including the EFTA, Regulation E, and the CFPB's recent Bulletin. Compliance with state law and regulations may not be enough to the extent the applicable state law provides less protection to employees and is preempted by the EFTA.

As CFPB Director Richard Corday has cautioned, "employees must have options when it comes to how they receive their wages." In other words, employers cannot mandate that employees receive wages on payroll cards. And for those employees that choose to do so, employers must ensure that the financial institution offering the payroll services provides the necessary protections, including disclosure of fees employees have to pay if they use the cards, access to their account histories, including their balances and any fees incurred, limits on employees' liability for unauthorized use, and error resolution rights.

Many have been skeptical of the CFPB's enforcement authority. However, in its recent Bulletin, the CFPB reiterated its intent to "be proactive about identifying violations, stopping violations . . ., maximizing remediation to consumers, and deterring future violations" of the EFTA by financial institutions and employers who fail to adhere to the rules and regulations applicable to payroll cards." The Bureau has just recently established many of its procedural rules and interpreted its supervisory and enforcement mandates. As a result, the Bureau can be expected to investigate many employer payment plans and inconsistent state laws that are

[134] *See* http://www.twc.state.tx.us/news/efte/electronic_fund_transfer_wages.html#top.

preempted by federal statutes and regulations.

VI. WORKPLACE BULLYING

Probably the most publicized, recent incident of potential workplace bullying was the alleged hazing of Miami Dolphins' Jonathan Martin by teammate Richie Incognito. According to published reports, Incognito (and possibly other teammates) allegedly harassed and bullied Martin verbally and via voicemails, engaged in physically threatening conduct, and may have coerced Martin to pay $15,000 for an unofficial team trip. While the Martin situation does not involve your typical work environment, according to a study by the Society for Human Resource Management, more than half of companies surveyed reported incidents of bullying in the workplace. More than twenty-five percent of human resource professionals reported that they had been bullied in the workplace. Approximately forty percent of companies reported having an anti-bullying policy in their employee manuals.

According to the Workplace Bullying Institute, the most common tactics used by workplace bullies include:

- Falsely accusing someone of errors the person didn't actually make;
- Hostile staring or nonverbal intimidation;
- Unjustly discounting a person's thoughts or feelings in front of others;
- Using the "silent treatment;"
- Making up rules for specific people;
- Disregarding and discrediting satisfactory work;
- Harshly and constantly criticizing a person;
- Starting, or failing to stop, destructive rumors or gossip about a person;
- Encouraging people to turn against a person being tormented;
- Singling out and isolating one person from other co-workers, either socially or physically;
- Publicly directing gross and undignified behavior at the victim;
- Yelling, screaming or throwing tantrums in front of others to humiliate someone.

Under current law, there are no state or federal anti-bullying statutes. Bullying directed against individuals in a protected class is precluded by Title VII and could give rise to claim of hostile work environment if directed against individuals in a protected class. Bullying could potentially give rise to claims for intentional infliction of emotional stress, civil assault (reasonable fear of physical harm), and civil battery (which can include unwanted touching).

In the absence of legislation, employers are devising alternative means of addressing workplace bullying. In Massachusetts, 21,000 state employees work under a collective bargaining agreement that addresses workplace bullying. The Sioux City, Iowa school district has adopted policies and enforcement procedures addressing workplace bullying for their adult employees.

The Healthy Workplace Campaign has drafted and is promoting a Healthy Workplace Bill that purports to impose civil liability on individuals who commit bullying in the workplace and employers who fail to take measures to prevent workplace bullying. Twenty-five states

since 2003 have introduced the bill; none has passed it. Eleven states have sixteen active bills before their legislatures.

The text of the draft bill is not publicly available. However, it purportedly defines an "abusive work environment" to include verbal abuse, offensive non-verbal conduct that is threatening, humiliating, or intimidating; and work interference. The bill also requires proof of health harm by a licensed health or mental health professional caused by workplace bullying. It protects conscientious employers from vicarious liability when internal correction and prevention mechanisms are in effect and requires the use of private attorneys to bring an action. It does not authorize state agencies to enforce the law. The claim is available regardless of whether the plaintiff falls within a protected class; it permits suits against the individual bully as well as employer; and permits recovery of lost wages and benefits.

Workplace bullying bills are currently pending in New Mexico, Hawaii, Florida, Wisconsin, West Virginia, Pennsylvania, New Jersey, New York, Vermont, New Hampshire, Massachusetts. Bills have been introduced but not passed in Washington, Oregon, California, Nevada, Utah, Montana, Minnesota, Oklahoma, Missouri, Illinois, Connecticut, Maryland, Maine, and Kansas.

Defining workplace bullying is fraught with difficulty. How do you distinguish between bullying and acceptable workplace behavior. For example, bullying generally involves (1) negative conduct or commentary; (2) continuing over time; and (3) between or among individuals where there is an imbalance of power. However, most supervisor-subordinate relationships in the workplace also involve an imbalance of power, and supervisors regularly provide feedback, including negative feedback, to employees (often over the course of time with poor performers). Does "bullying" fall within Justice Potter Stewart's well-known description of obscenity? " I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .

Employers who have not already done so, should consider adopting policies prohibiting bullying in the workplace. For more information on the workplace bullying legislation, *see* http://www.healthyworkplacebill.org.