Breakout Sessions – Series 5

DISCRIMINATION, RETALIATION, AND HARASSMENT

THE UNIQUE ISSUES PRESENTED BY THIRD PARTIES

◆◆◆◆◆

Michael H. Bell (Moderator) – Ogletree Deakins (Denver/Dallas)

Amy M. Pocklington – Ogletree Deakins (Richmond)

Sean C. Urich – Ogletree Deakins (Dallas)
The typical way employers encounter harassment, discrimination, and retaliation issues is in the context of a binary conflict between employer and employee. The employee is claiming that something happened to him or her (firing, denial of promotion, denial of leave, failure to accommodate) and the employer’s reason for doing it was unlawful. But sometimes, employers are forced to deal with either the presence or the influence of a third party that is an outside force on the typical employer-employee dispute, whether it be a vendor harassing an employee, a customer articulating a discriminatory preference, or an employee’s close friend supporting her complaint of discrimination. This paper examines the liability risks associated with such claims and strategies for minimizing those risks.

I. HARASSMENT BY NON-EMPLOYEES

Courts routinely hold that an employer may be liable for third party, non-employees who create a hostile work environment if (a) the employer knew or should have known of the harassment; and (b) failed to take prompt remedial action reasonably calculated to end the harassment. Courts have found employers liable for third party harassment in a wide variety of situations, including harassment of employees by independent contractors, individuals in the employer’s care (i.e., patients and inmates as discussed infra), and customers. This last category can be particularly difficult for employers to navigate because remedying and preventing unlawful harassment can, at times, require an employer to damage or even sever a customer relationship. Courts have uniformly refused to find the loss of or damage to a customer relationship sufficient justification for an employer’s failure to prevent or halt harassment of an employee.

A. Establishing Harassment—the Claimant’s Burden

To establish a prima facie case of “hostile work environment” harassment, a plaintiff must show she (1) belongs to a protected group; (2) has been subjected to unwelcome harassment, (3) the harassment was based on her protected group; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) has a basis for holding the employer liable. The severe or pervasive standard has been set out as a “middle path between of making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.” Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–23 (1993). A plaintiff “must subjectively perceive the harassment as sufficiently severe or pervasive, and this subjective perception must be objectively reasonable.” Frank v. Xerox Corp., 347 F.3d 130, 138 (5th Cir.2003) (citing Harris, 510 U.S. at 21).

In third party harassment cases, a plaintiff must demonstrate the fifth element of a “hostile work environment” harassment claim by showing the employer had actual or constructive notice of the harassment and failed to take sufficient corrective action. See, e.g., Curry v. Koch Foods, Inc., No. 2:16-CV-02008-SCG, 2019 WL 1281196, at *7 (N.D. Ala. Mar. 20, 2019). Actual notice is established by proof management knew about the harassment. For example, where an employee shows she complained to management, or that her employer had a clear, published policy setting forth the procedure for reporting harassment and she followed that procedure, actual notice is established. Additionally, constructive notice can be established where harassment was so severe and/or pervasive that management reasonably should have known about it.
B. Employer Liability—Actions Matter

An employer may be liable if the employee makes an effort to inform the employer of a harassment problem, the employer knew or should have known that the harassment was taking place, and the employer failed to take prompt and appropriate corrective action that is reasonably likely to prevent the recurrence of harassment. An employer is not liable for third party harassment of which it had notice, provided it took sufficient corrective action. See Wilcox v. Corr. Corp. of Am., 892 F.3d 1283, 1287-88 (11th Cir. 2018) (describing the response required as “prompt” corrective action). The corrective action must be reasonably likely to prevent the harassment from recurring, which is determined on a case-by-case basis. Employers also must take care not to penalize, or retaliate against, the employee reporting the harassment.

Maintenance of robust anti-harassment policies and reporting structures is critical to decrease the likelihood of harassment claims and facilitate a prompt response. However, even when the employer maintains an anti-harassment policy and reporting procedure, the employer is not shielded from liability if prompt remedial action was not taken after receiving the complaint. While the adequacy and effectiveness of such policies and response protocols are analyzed on a case-by-case basis, employers in certain industries are especially susceptible to third party harassment claims.

C. Special Considerations

1. Healthcare Facilities and Institutions

Employees of healthcare facilities are especially susceptible to third party harassment since the employee is required to work closely with patients that may suffer from mental incapacities, emotional disturbances, and serious illnesses. In a Medscape Medical News survey released last July, more than one in four physicians reported being sexually harassed by a patient. This percentage is nearly four times higher than the percentage of physicians (7%) who reported being sexually harassed by coworkers in the workplace. Courts around the country have found triable hostile work environment claims when patients are the source of the harassment. In a recent case, Gardner v. CLC of Pascagoula, L.L.C., 915 F.3d 320, 323 (5th Cir. 2019), as revised (Feb. 7, 2019), plaintiff Gardner was a nursing assistant at an assisted living center. One patient at the facility was persistently violent toward staff, had a reputation for groping female employees, and had been diagnosed with dementia, traumatic brain injury, personality disorder, and Parkinson’s disease. Gardner submitted complaints about the patient, but the facility declined to submit the patient for psychiatric evaluation after aggressive altercations and told Gardner to “get back to work.” Gardner continued to care for the patient and was subsequently punched three times, necessitating emergency care. Gardner was subsequently fired for various reasons, including insubordination in refusing to continue to care for the patient. The district court granted the employer’s summary judgment motion, reasoning it was not clear that the patient’s conduct was beyond what a person in Gardner’s position should expect. However, the Fifth Circuit Court of Appeals reversed the summary judgment grant, noting the conduct was sufficiently severe and pervasive to put the employer on notice of the harassment, and that a jury should decide whether the subsequent response was reasonable.

Like employees of healthcare facilities, employees working in institutions such as prisons, are frequently placed in the position of enduring harassment by third party individuals who may have mental incapacities or behavioral issues, which can lead to liability for the employer. For example, in Beckford v. Dep’t of Corr., 605 F.3d 951, 954 (11th Cir. 2010) the
question was whether the Florida Department of Corrections could be liable for failing to remedy a sexually hostile work environment that male inmates created for female employees at a prison. In *Beckford*, fourteen female employees worked closely with inmates and were subjected to offensive conduct including gender-specific abusive language and the pervasive practice of inmates openly masturbating toward female staff. The Eleventh Circuit Court of Appeals affirmed a jury verdict holding the Department liable because it unreasonably failed to remedy the sexual harassment by its inmates. The female employees complained to prison management, including the warden, about the conduct of the inmates but testified that management ordinarily ignored these complaints. Further, while the Department maintained a sexual harassment policy, it did not address the issue of harassment from inmates. The court further found that the Department could have required security personnel to accompany female staff, or required inmates wear pants when female staff were in close proximity, or issue disciplinary reports to inmates for the behavior to protect its employees.

2. The Retail and Service Industries

Employers in the retail and service industries also face unique challenges relating to third party discrimination. Restaurants especially encourage the idea that the customer is “always right” and promote friendliness between wait staff and patrons, which can lead to an increased likelihood of customer harassment.

For example, in *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998), the plaintiff waitress alleged her manager failed to respond properly to the inappropriate conduct of two crude and rowdy male customers who had eaten at the restaurant several times and had made sexually offensive comments to her. Lockard asserted that after a patron had pulled her hair, she asked to be excused from waiting on these particular customers. The restaurant manager told her that she would not be excused from waiting on them in that she was “hired to be a waitress, and she would be a waitress.” As a result, one of the customers again made sexually offensive remarks, pulled her hair, forced her into his lap, groped her breast, and put his mouth on her breast. The court affirmed a judgment in favor of Lockard, reasoning that because Lockard’s manager had notice of the customers’ harassing conduct and failed to remedy or prevent the hostile work environment, the employer was liable for his failure.

Relatedly, establishments such as casinos have been alleged to create sexualized workplaces for employees, where intoxicated customers may sexually harass female dealers and use offensive slurs. In *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992), for instance, a female blackjack dealer was terminated for rudeness to customers. She complained that she was fired in retaliation for reporting sexual harassment. On one occasion, Powell claimed a drunk customer screamed at her and told her she had “great tits,” and when she told her supervisor, the complaint was ignored. The casino argued that “it was inevitable in a job that requires constant contact with the public (particularly one in a city that is a ‘fun’ destination where people sometimes imbibe to excess and often lose more money than they should) that customers will sometimes make inappropriate comments, sexual or otherwise.” The court disagreed, sending the question of whether the casino’s anti-harassment policy was adequate or enforced to the jury.

In contrast, the court in *Folkerson*, 107 F.3d 754, 756, (9th Cir. 1997) came to a different conclusion. In that case, the plaintiff was a mime who worked as a “living doll” on the casino floor. After she complained that patrons would touch her under the pretense of determining whether she was a real person, the casino issued her a “do not touch” sign, assigned a large male performer to work with her, and instructed her to call security with any issues. Despite
these precautions, another customer touched the plaintiff, and she responded by striking him in the mouth. The court held that the casino’s response to the plaintiff’s complaint was reasonable, as was its termination of her employment for violence toward a customer.

D. Compliance, Prevention, and Response

Through all of these cases, the recurring message is that employers should maintain and enforce an anti-harassment policy that covers third parties and should also implement and follow a procedure for reporting harassment claims. However, additional tools are available to employers and are increasingly being utilized. For instance, perhaps partially in response to the call for redress stemming from the #MeToo movement, some casinos agreed in 2018 in collective bargaining to give panic buttons to workers who are vulnerable to sexual harassment. The labor contracts cover 36,000 service workers at the Bellagio, Mandalay Bay, the Mirage, MGM Grand, Caesar’s Palace, and other iconic casinos on the Las Vegas Strip, according to the Culinary Workers Union’s Local 226. See https://www.vox.com/2018/7/6/17540438/sexual-harassment-panic-button-for-casino-workers. Other prevention tools include regular anti-harassment training that covers third parties, posted store conduct rules applicable to customers and invitees, robust anti-harassment language in contracts with vendors and business partners, and safety measures such as security cameras and escorts.

Although these measures can reduce the risk of harassment occurring, it remains the employer’s response that is the key to avoidance of liability. This response should include:

1) Ensuring the immediate separation of the alleged harasser and complainant;
2) Investigating the complaint promptly and thoroughly, interviewing all witnesses (with an initial examination of whether the investigation should be privileged);
3) Coordinating with the alleged harasser’s employer as necessary;
4) In cases where the conduct is verified, determining what measures are appropriate to exclude the harasser from the workplace or require anti-harassment training before he or she is permitted to return;
5) Accommodating the complainant with paid time off, or a non-adverse transfer as appropriate; and
6) Ensuring the complainant does not experience retaliation.

E. Key Takeaways

In almost any workplace environment, an employer may be liable for third party harassment, regardless of the assumed risk or natural susceptibility based on the type of industry. The key takeaways for employers are: be vigilant of policies and environments putting employees at risk, maintain policies that address third party harassment, conduct regular training for handling third party harassment, and respond promptly and effectively to reports of harassment.

II. CUSTOMER PREFERENCE DISCRIMINATION

With third party harassment claims, the employer is placed in the difficult position of guarding against and responding to unlawful conduct originating from non-employees. However, such third parties can also be the source of a different kind of risk: unlawful discriminatory preferences from an employer’s customers. Because employers in these contexts are responsible for providing a workplace free from discrimination—not only by other
employees, but also by third parties—it is important to address what conduct an employer may be liable for in these situations, and how to minimize exposure to such risks.

As an initial matter, employers must always base their personnel decisions on legitimate, non-discriminatory business reasons. This means that employers may not rely on the discriminatory preferences of customers to justify adverse employment actions. The EEOC has provided guidance on such discriminatory customer preferences in the context of race and national origin discrimination, as well as gender discrimination. In its updated 2016 guidance, the EEOC points out “an employment decision based on the discriminatory preferences of others is itself discriminatory.” See Enforcement Guidance: National Origin Discrimination § III (B)(1). Further, in response to a request for guidance on the legality of asking inmates in a coaching program whether they would have concerns with a mentor of a different ethnicity, the EEOC advised against this, “[j]nasmuch as posing the question . . . is likely to lead to race or ethnic-based assignments or would be perceived as the basis for such assignments.” See Informal Discussion Letter, EEOC Office of Legal Counsel, “Title VII: Customer Preference” (March 9, 2009), https://www.eeoc.gov/eeoc/foia/letters/2009/titlevii_customer_pref.html. In that context, the employer would likely be found to have violated Title VII if employment assignments were made based upon parolees’ request for a mentor of a specific race or ethnicity. Id.

Discriminatory customer (or patient) preferences can be particularly challenging in the health care industry. A 2016 study published in Academic Medicine suggested that 20% to 40% of physicians have personally experienced or know someone who has experienced rejection by a patient based on his or her race or ethnicity. Emily Witgob, Rebecca Blankenburg, Alyssa Bogetz, The Discriminatory Patient and Family: Strategies to Address Discrimination Towards Trainees, ACADEMIC MEDICINE, 91(11):S64-S69, Nov. 2016. But courts have consistently held that an employer’s obligation to provide a discrimination-free workplace takes precedence over a patient’s racial preference. Specifically, in Chaney v. Plainfield Healthcare Center, 612 F.3d 908, 914 (7th Cir. 2010), the Seventh Circuit held that Title VII prohibits patients’ racial preferences from dictating employee duties at a healthcare facility. In that case, the nursing home had a policy of honoring racial preferences by caregivers, allowing residents to select or deselect providers by race. After terminating an African American CNA for alleged use of profanity and “bed alarm and call-light infractions,” and “not doing a shift change,” the nurse filed suit under Title VII, alleging the nursing facility’s practice of adhering to the residents’ racial biases was illegal and created a hostile work environment. In overturning the district court, the Seventh Circuit noted that it “found no trouble” finding that a reasonable person would find the nurse’s work environment resulting from tolerating these patient biases to be hostile or abusive. Moreover, the court did not find the employer’s efforts to stop the staff’s hostile or abusive conduct to be adequate.

However, courts and the EEOC have recognized the possibility of sex, age, religious and race-based bona fide occupational qualifications (“BFOQ”), if the same are “reasonably necessary to the normal operation of that particular business or industry.” 42 U.S.C. § 2000e-2(e). See also EEOC, Compliance Manual § 625, Bona Fide Occupational Qualifications, at §§625.7(b), 625.9 (1982); Informal Discussion Letter, EEOC Office of Legal Counsel, “Title VII BFOQ” (March 5, 2002), http://www.eeoc.gov/eeoc/foia/letters/2002/titlevii_bfoq.html. To argue that a person’s protected characteristic is a BFOQ, the employer must show that (1) the protected class is an actual qualification for the job; and (2) the requirement is necessary to the normal operation of the business. Classic examples are religious affiliations for churches and hiring actors of a particular national origin or race in the entertainment industry for the purpose of authenticity.
Accordingly, sex may be a BFOQ for healthcare employers honoring a patient’s request not to have an opposite-sex caregiver, as to care that involves issues of intimate personal privacy, such as toileting or examinations of private areas. However, psychological comfort with the same gender is rarely enough to justify sex discrimination as a BFOQ. One rare exception is the case Healey v. Southwood Psychiatric Hospital, in which the employer argued the hospital should be able to take sex into account when making hiring and scheduling decisions in order to secure sufficient male and female staffing for each shift. 78 F.3d 128 (3d Cir. 1996) In that case, the Third Circuit agreed that, given the hospital’s therapeutic and privacy concerns regarding its patients, the essence of the hospital’s business of treating emotionally disturbed and sexually abused adolescents would be undermined if it could not consider staff members’ sexes in making shift assignments, and therefore the hospital established a BFOQ defense to staff members’ Title VII challenge to such policy. However, that same year a federal court in Missouri came to the opposite conclusion, in rejecting sex as a BFOQ in the case of a weight loss clinic, where 95% of the clients were women who indicated they would not feel comfortable with a man taking their measurements and weight. EEOC v. Hi 40 Corp., 953 F. Supp. 301 (W.D. Mo. 1996). As these issues are necessarily fact-specific, healthcare employers are advised to rely upon such BFOQs only in response to specific patient requests as opposed to implementing blanket policies based on employer assumptions.

A potential alternative to the BFOQ defense, the equal burdens doctrine justifies different appearance requirements for different genders, to the extent those burdens imposed by such requirements are equal. For instance, the Eighth and Ninth Circuits have upheld appearance standards for TV reporters and casino employees under the equal burdens doctrine. Craft v. Metromedia, Inc., 572 F. Supp. 868 (8th Cir. 1985); Jespersen v. Harrah’s Operating Company, Inc., 392 F.3d 1076 (9th Cir. 2004). Specifically, in Harrah’s, the court ruled against a casino worker who sued based on the casino’s “Personal Best” program, which required men to keep their hair above their shirt collar, while requiring women to keep their hair styled and apply face powder, blush, and mascara. The court concluded, however, that the plaintiff had not done enough to prove it was more time consuming and expensive for women to comply with the daily hair and makeup requirement than for men to comply with keeping their hair relatively short. Id. However, the same court in another case struck down body frame and weight standards for flight attendants, where men were held to a “large” body frame requirement while women were expected to meet a more stringent “medium” frame requirement. Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000).

But even if an employer’s policy regarding appearances is not facially about a protected class at all, employers still face the risk of violating anti-discrimination laws if these policies have a disparate impact on protected classes. For example, race-based challenges to appearance policies prohibiting beards frequently succeed, where African American men may argue they are disparately impacted by such policies because of a skin condition that results in serious skin irritation from shaving. On the other hand, English-only policies supported by customer preferences are typically upheld in environments where customers may feel uncomfortable and not want to approach employees who speak another language.

On the whole, customer preferences rarely justify discriminatory policies or disparate treatment. While the equal burdens doctrine may afford an easier defense than the BFOQ, its practical use is limited considering how narrow the exception is. Employers must carefully train those who hire, fire, and evaluate to prevent customer biases from influencing employment decisions based on protected categories.
III. RETALIATION AGAINST A THIRD PARTY

A. Retaliation: The Basics

Retaliation is the most frequently alleged basis of discrimination and the most common discrimination finding in federal cases according to the EEOC. Retaliation requires an employment action that a “reasonable employee would have found materially adverse.” Burlington No. and Santa Fe Ry. Co. v. White, 548 U.S. 53 (2006). “Materially adverse” is further defined as employment action that “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.” The phrase “might well” lends itself to a variety of interpretations by the courts since the Burlington decision. Employers are often left wondering what exactly would dissuade a “reasonable worker.”

In 2011, the Supreme Court considered a case involving a novel situation: a plaintiff asserting a retaliation claim despite having never himself complained of discrimination or harassment. Specifically, the case involved a plaintiff and his fiancée who were co-workers. The plaintiff’s fiancée filed a discrimination charge against her employer. In response, the employer took no action against the fiancée, but discharged the plaintiff. The Court found it “obvious that a reasonable worker might be dissuaded from engaging in protected activity” if she knew her fiancé would be fired, and found that the plaintiff could bring a retaliation claim despite never complained of discrimination himself as he was within the “zone of interests” sought to be protected by Title VII. Thompson v. N. Am. Stainless, LP, 562 U.S. 170, 175 (2011). The Court, however, declined to identify a fixed class of relationships for which third party reprisals would definitely be unlawful. Id. at 174.

B. Third Party Retaliation: The Evolution

In the wake of Thompson courts have continued to apply the Thompson and Burlington standards with varying outcomes in third party retaliation claims. The following illustrate the expansiveness of courts’ interpretations:

- In 2014, the U.S. District Court for New Hampshire denied an employer’s summary judgment, viewing a close friend of the complainant to be a relationship that “exists somewhere in the fact-specific gray area between close friend and casual acquaintance.” Although the Court could not say such a friendship definitively would support a successful claim, it also could not “say as a matter of law that it does not.” EEOC v. Fred Fuller Oil Co., 2014 WL 347635, at *6 (D.N.H. Jan. 31, 2014).

- The following year, the U.S. District Court for the Middle District of Pennsylvania found a plaintiff’s status as boyfriend of the complainant well within the Thompson “zone of interests” for a retaliation claim. Antonelli v. Sapa Extrusions Inc., 2015 WL 365683, at *4 (M.D. Pa. Jan. 27, 2015).

- In 2018, the U.S. District Court for Connecticut denied an employer’s motion to dismiss, viewing the relationship between the plaintiff and a coworker that “shared a relationship of friendship and confidence . . . sufficient to plead a third party retaliation claim.” Cobb v. Atria Senior Living, Inc., 2018 WL 587315, at *6 (D. Conn. Jan. 29, 2018).
• However, that same year, the U.S. District Court for the Middle District of North Carolina looked to *Thompson* in rejecting plaintiff’s argument that he was within the “zone of interests” when he characterized his relationship between himself and the other plaintiff as merely “closely affiliated.” The court found the two were nothing more than co-workers, which was insufficient to satisfy the *Thompson* test. *Fleming v. Norfolk S. Corp.*, 2018 WL 1626523, at *3 (M.D.N.C. Mar. 31, 2018).

Third party retaliation claims will likely apply to most labor laws going forward, as courts have applied the *Thompson* analysis to retaliation claims outside the Title VII context (FMLA, FLSA, etc.). Courts consistently apply the “might well have dissuaded” analysis to inform their decisions on employer liability. In practice, the likelihood of such claims prevailing depends upon (1) the severity of the alleged materially adverse employment action and (2) the nature of the relationship between the complainant and the plaintiff. For example, a termination of a complainant’s parent or spouse would be quite likely to result in a viable claim, while a mere office move of a complainant’s co-worker would be unlikely to result in liability. What is clear is that the courts’ main focus is to ensure that workers are not being dissuaded from asserting their rights, no matter what actions the employer is taking.
Discrimination, Retaliation, and Harassment: The Unique Issues Presented by Third Parties

Presenters
Amy M. Pocklington (Richmond) and Sean C. Urich (Dallas)

Moderator
Michael H. Bell (Denver/Dallas)

What Are We Talking About?

- Harassment by Non-Employees
- Customer Preference Discrimination
- Third Party/Associational Retaliation
Harassment by Non-Employees

Harassment Basics

- *Prima facie* case
- Work environment must be *both* objectively and subjectively abusive.
- Totality of the circumstances:
  1) Frequency
  2) Severity
  3) Physically threatening/humiliating vs. mere offensive utterance
  4) Unreasonable interference with work performance
How Can Employers Be Liable for Non-Employee Conduct?

- Liability hinges on:
  - Employer’s knowledge of harassment
  - Employer’s response
- Altering terms and conditions of employee’s employment is not enough

Employer Liability – Response Matters

- We must focus as much on the employer’s response to the alleged harassment as the harassment itself
- 9th Circuit: Failure to take immediate and/or corrective action when employer knew or should have known of conduct equals...

   Ratification and Acquiescence
What Kind of Response?

- **Before Harassment**
  - Policy development
  - Training
  - Store rules
  - Contract language with vendors, business partners
  - Safety measures (cameras, etc.)

What Kind of Response? (cont.)

- **After Harassment**
  - Investigate and cooperate (Privilege?)
  - Address with harasser/harasser’s employer
  - Ensure separation of harasser and victim
  - Possible to mandate training?
  - Paid time off for victim
  - No retaliation
Special Considerations: Policies Creating Susceptibility to Harassment

- Dress Codes (cocktail waitresses, revealing costumes/uniforms)
- “Personability” Policies (mandated friendliness, smiling, etc.)

Special Considerations: Healthcare

- Constant close proximity to third parties (patients, family members, etc.)
- Employer compromised in ability to remove harasser
- Alleged harassers may be in compromised mental/emotional states
Special Considerations: Retail

- “Customer is always right” mentality
- Mistaken belief harassing customers won’t return

Special Considerations: Contractors/Vendors

- Major points:
  - Control over third party
  - Swift corrective action
  - Prevention from reoccurrence
Example: Employer Held Liable

- Pizza restaurant
  - Safety auditor harassed employee
  - Employee complained
  - Employer’s response was less robust than it was with complaints of employee-on-employee harassment

Example: Employer Not Held Liable

- Hospital
  - Doctor with staff privileges harassed surgical tech
  - No “quid pro quo”
  - Hospital told doctor conduct unwelcome
  - Required doctor to take harassment awareness training
  - Warned doctor of possible termination of staff privileges
Is the Employer Liable?

- **Scenario 1:**
  - Stalker client harasses Female Public Defender 1
  - Supervisor reassigns client to male attorney
  - Client later harasses Female Public Defender 2
  - Months later, client is represented by Female Public Defender 2 on new charge, and harasses her
  - When she complains, supervisor is reluctant to reassign, she says she will try to finish case
  - Behavior worsens, causes PTSD

- **Scenario 2**
  - Bartender harassed by three patrons
  - Manager prohibits patrons to sit near bartender
  - Patrons would glare, smile, smirk
  - 3 months later, patrons sit at bartender’s bar again
  - This time, manager won’t move them
  - Bartender terminated soon thereafter
Is the Employer Liable?

- **Scenario 3:**
  - Customers make lewd comments to blackjack dealer, and also stare and gesture sexually
  - Management tells dealer to take it as a compliment and that customers are allowed to stare
  - Dealer instead responds with rudeness to customers, and is terminated as a result

- **Scenario 4:**
  - Employee works as a mime, costumed as a “living doll” at Defendant's casino
  - Mime complains some patrons would try to touch her
  - Employer instructs her to call security if any problems, provides her with a "Stop, Do Not Touch" sign, and assigns large male performer to accompany her
  - A patron later touches Plaintiff on the shoulder, who responds by hitting him in the mouth
  - Casino terminates mime after reviewing videotape
Takeaways

- Take employee safety and complaints seriously, even if they concern non-employees
- Be vigilant of policies putting employees at risk
- Maintain policies that address third-party harassment
- Conduct regular training for handling third-party harassment
- Investigate and timely address concerns

Customer Preference Discrimination
What Is Customer Preference Discrimination?

- Employer attempts to justify favoring one group over another due to customer preference
- Touchstone is still the Employer’s response to the discriminatory animus
- For disparate treatment, it’s all about the BFOQ (usually)

The Limits of BFOQ

- *Diaz v. Pan Am* (1971) – Customer preference for female flight attendants not a BFOQ.
- *Fernandez v. Wynn Oil* (1981) – Concern over Latin American clients’ reaction to a female vice president not a BFOQ.
“Right to Choose” vs. Right to be Free from Discrimination

- Patients’ racial preferences cannot be honored
- Honoring gender preferences frequently found legal
  - Care involving issues of intimate personal privacy
  - Blanket policies disfavored

More “Scandalous” BFOQs

- More controversial
  - Playboy bunnies
  - “Gentlemen’s” clubs
  - Certain restaurants (Hooters, Twin Peaks, etc.)
  - Still high-risk
Equal Burdens Doctrine

- Alternative to BFOQ
- Different appearance requirements for different genders, but equal burdens
- Upheld: Appearance standards for TV reporters, casino employees
- Struck down: Body frame/weight standards for flight attendants

Disparate Impact Cases

- Disparate impact – not facially about protected class at all
  - Example: 6 foot height requirement
- Touchstone is “job related and consistent with business necessity”
- Aesthetic preferences
- Language preferences
Takeaways

- Customer preference rarely justifies disparate treatment
- Equal burdens doctrine easier to defend than BFOQ, but narrow application
- Customer preference an easier defense in disparate impact cases, but focus on immutable vs. mutable characteristics

Third Party/Associational Retaliation
Retaliation Basics

- Retaliation requires employment action that a “reasonable employee would have found materially adverse”
- “Materially adverse” = “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination.”


- Plaintiff and fiancée both employees
- Fiancée filed discrimination charge
- Employer fired not fiancée, but Plaintiff
- Supreme Court went straight to “might well have dissuaded”
- Court declined to identify fixed classes of relationships
Evolution of the Theory: The Relationship

- **EEOC v. Fuller Oil** (D.N.H. 2014) – Close friend of complainant
- **Antonelli v. Sapa Extrusions** (M.D. Pa. 2015) – “Boyfriend” of complainant
- **Cobb v. Atria Senior Living** (D. Conn. 2018) – “Work friend” of complainant
- **Fleming v. Norfolk Southern** (M.D.N.C. 2018) – Co-worker status not enough

Evolution of the Theory: Beyond Title VII

- **O’Donnell v. America At Home Nursing** (N.D. Ill. 2015): Plaintiff’s claim she was terminated in retaliation for husband’s FLSA complaint
- **Kastor v. Cash Express of TN** (W.D. Ky. 2015): Comparator status in an FMLA claim
Takeaways

- Analysis will probably apply to most labor laws
- “Might well have dissuaded” continues to inform the analysis
- Both adverse action and relationship important
- For now, co-worker status is a basic requirement
- Further extensions are possible

Questions?
Discrimination, Retaliation, and Harassment: The Unique Issues Presented by Third Parties

Presenters
Amy M. Pocklington (Richmond) and Sean C. Urich (Dallas)

Moderator
Michael H. Bell (Denver/Dallas)