




2017 FISHER PHILLIPS ANNUAL LABOR AND EMPLOYMENT LAW SUMMIT
APRIL 20 | FORT LAUDERDALE

Playing With Fire: Turning Down The Heat on Harassment Claims

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™



Today's Workplace Is Challenging For Employees

Among the most heated and polarized time in recent history

- **24/7 Coverage of Social and Political Events**
 - News as entertainment
 - Twitter providing a constant feed of information
 - The rise of "fake" news
- **Social and Political Events at the Center of Debate and Controversy**
 - 2016 Election Cycle and a new administration
 - Movements and marches (Black Lives Matter, All Lives Matter, Post-Election Women's March, LGBT rights, Religious freedom, etc.)
 - Immigration ban
- **Business Leaders Are Taking Sides**
- **Pop Culture and Prime Time Much More Graphic**
 - Comedic reporting on election and candidates
 - Graphic scenes from popular shows
- **Ongoing Issues with Gender and Sexual Harassment**
 - Politician "hot mic" comments
 - Various accusations against those running for or elected to office
 - The sexual abuse crisis on American college campuses

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™



Technology Makes It Easy To Spread Your Opinion

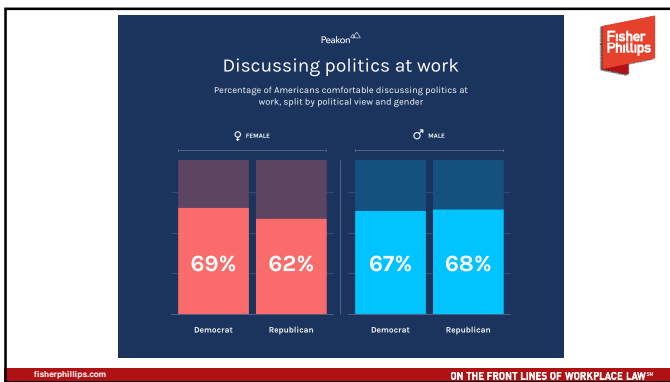
- **Technology is smaller, more powerful and more portable**
 - Smartphones
 - Tablets
 - Cameras
 - Personal Assistant Devices
 - Watches
 - "Smart" everything
- **Applications and tech keep us constantly connected and engaged**
 - Geo locate applications
 - Social media of all forms
 - The ability to publish your ideas instantly
 - The ability to comment on anything and everything publicly

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™

These Conversations Are Happening In Your Workplace

- *Your employees* are at rallies and making online comments
- *Your employees* arrive at work each day with their own unique:
 - Ideas
 - Beliefs
 - Morals
 - Judgments
 - Opinions
- And now more than ever *your employees* have something to debate with their coworkers and *your* business partners
- Heated conversations can quickly turn disrespectful and lead to:
 - Harassment
 - Discrimination
 - Retaliation

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™





What Do You Think:

In the last 12 months, has your organization had to navigate an employee issue involving political speech?



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Horizontal lines for handwritten response.

What Do You Think:

In the last 12 months, has your organization provided employees with training on political speech at work?



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Horizontal lines for handwritten response.

What Is Illegal Harassment?



• **Quid pro quo:**

- When a company permits a supervisor to deny employment opportunities or benefits because an applicant or employee did not submit to sexual advances. There is strict liability for the company AND personal liability for the supervisor

• **Hostile Work Environment:**

- Unwelcome conduct toward the victim based on protected category
- That is so "severe" or "pervasive" when viewed by the "totality of the circumstances"
- As to alter the conditions of employment and create an abusive working environment for the victim AND for a reasonable person

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Horizontal lines for handwritten response.



**What Does Not Matter:
Invalid Defenses To Harassment Claims**

- Lack of intent – "I didn't mean it that way"
- "Right" to express one's view - "I have the right to my opinion"
- Absence of a complaint – "She never complained about it"
- Workplace versus non-workplace conduct
- General, non-focused conduct – "I was telling the joke to everyone"
- The "indiscriminate" manager – "I am crass with both men and women" or "I am a 'touchy-feely' person with everyone"
- Office affairs, dating and flirting – "I was just flirting" or "I'm just a very friendly person"

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™

**What Does Matter:
Recognized Affirmative Defense**

- If the harasser is a supervisor with immediate/higher authority over the plaintiff, and there is an adverse action, the company is strictly liable
- An affirmative defense may be available under Title VII if:
 - A well publicized non-harassment policy and investigation procedures exist
 - The company exercised reasonable care to prevent and correct promptly any harassing behavior
 - Employee unreasonably failed to take advantage of the preventative and corrective opportunities or to avoid harm otherwise

fisherphillips.com ON THE FRONT LINES OF WORKPLACE LAW™

Management Do's And Don'ts



- **DO**
 - Remember that *managers* are the company; tone at the top matters
 - Take all complaints seriously and investigate immediately
 - Remind employees that the company does not tolerate harassment, discrimination or retaliation
 - Be a role model in following the company's policies
 - Respect differences in perspective and respect each other
 - Regularly review policies and attend relevant training
- **DON'T**
 - Engage in inappropriate behavior
 - Do anything that you would be embarrassed to have repeated back to your spouse, significant other, children, parents or grandparents
 - Trivialize concerns or wait for it to become severe or pervasive
 - Prejudge the allegations or jump to conclusions

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

What Do You Think:

Do employees have a right to free speech at work?



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Answer:



- It depends on whether the employer is private or public (i.e., governmental)
- No First Amendment right for private employers
- For employees of governmental institutions, their speech rights are protected so long as:
 - a) Speech relates to a matter of public concern, and
 - b) Commenting outweighs public employer's interest in providing public service

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Supreme Court Ruling: Perceived Politics is Protected by the First Amendment



- United States Supreme Court Ruled that a retired N.J. police officer can pursue a claim that he was demoted in violation of the First Amendment because of his **perceived** politics.
- **Facts:** Jeffrey Heffernan was demoted from a detective's post in the police chief's office after he was observed by the Paterson Mayor's security personnel talking to a mayoral opponent's campaign manager amid a crowd of campaign staff and supporters.
- Heffernan stated that he was simply picking up a campaign sign that his bedridden mother hoped to display on her lawn.
- The City of Paterson argued that the fact Heffernan admittedly wasn't engaging in constitutionally protected activity was fatal to his free speech claim.

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Heffernan v. City of Paterson



The Supreme Court disagreed with the City:

"The government's motive likewise matters here, where respondents demoted Heffernan on the mistaken belief that he had engaged in protected speech." "A rule of law finding liability in these circumstances tracks the First Amendment's language, which focuses upon the government's activity."

"Moreover, the constitutional harm — discouraging employees from engaging in protected speech or association — is the same factual mistake."

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Significance of Heffernan v. City of Paterson



- Warning For Public Employers to Use Caution Before Proceeding with Discipline:
 - Actual Speech
 - Perceived Affiliation
 - Actions

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Political Discussions In The Workplace



- Constitutional freedom of speech does not generally apply in the private workplace
- But there are some very important limits placed on employers' rights to limit speech:
 - National Labor Relations Act (even for non-union employers)
 - State Law protecting lawful off-duty conduct
 - Local Law
 - Broward County Ordinance

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Political Discussions In The Workplace



- Section 7 of the National Labor Relations Act (NLRA):
 - Protects a non-supervisor employee's right to discuss and engage in protected concerted activities
- Such speech could include topics of a political nature, such as:
 - Right to work legislation
 - Discussions regarding which candidates are pro-union
 - Political engagement around discrimination and fair pay
- Wholesale prohibition on communications regarding political matters likely overbroad

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Examples of Political Speech That May Be Protected by the NLRB



- The General Counsel of the NLRB has stated that an employer may not interfere with political speech where there is "a direct nexus between employment related concerns and the specific issues that are the subject of the advocacy"
- "Support Bernie Sanders because he will raise the minimum wage" vs "Support Donald Trump because he will make America great again."

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Political Discussions In The Workplace



- Lawful Off-Duty Conduct Laws:
 - Generally prohibit employers from penalizing an employee because of lawful off-duty conduct
 - Limited number of states have laws
 - Protections extended to managers and employees
- Examples of lawful conduct:
 - Participating in a rally or march
 - Posting opinions online
 - Commenting online

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Political Discussions In The Workplace



- Local Laws – Broward County Ordinance
- Sec. 16½-2. Purposes; construction.**
- (a) The general purposes of the Broward County Human Rights Act are:
- (1) To express support within Broward County for the policies embodied in Titles II, III, and VII of the Federal Civil Rights Act of 1964, as amended; Title VIII of the Federal Civil Rights Act of 1968, as amended; Section 504 of the Federal Rehabilitation Act of 1973, as amended; the Civil Rights Act of 1991, as amended; the Age Discrimination and Employment Act of 1967, as amended; the Americans with Disabilities Act of 1990, as amended; and other federal and state anti-discrimination laws; and
- (2) To secure for all individuals within the County freedom from discrimination because of race, color, religion, sex, national origin, age, marital status, **political affiliation**, familial status, disability, sexual orientation, pregnancy, or gender identity or expression, in connection with employment, public accommodations, and real estate transactions, and thereby to promote the interests, rights, and privileges of individuals within the County.

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Best Practices For Staying Ahead Of The Problem



- Put clear and reasonable policies in place:
 - Employers may put into place relevant policies (non-solicitation, social media, email communications, etc.)
- Generally OK:
 - To maintain rules about what happens during working time regarding business issues (productivity, safety, distribution of literature during worktime in work areas etc.)
 - To prohibit conduct that violates non-violence, non-discrimination or anti-harassment policies.
- Generally Not OK:
 - Prohibit employees from discussing union or other protected activity during non-working time (meal/rest breaks)
 - Attempts to limit discussions regarding compensation/benefits
- Ensure policies are carefully vetted by legal counsel
- Apply policies fairly and consistently - content neutral if possible

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

How To Handle Disrespectful Speech



- Is Corrective Action An Option?
- When conduct occurs at work or directly impacts the workplace:
 - Does the conduct concern terms and conditions of employment (pay, benefits, unions, etc.)?
 - Does the conduct violate company policy (non-harassment, etc.)?
 - Fairness and precedent are important, so how has the company acted in similar situations?
- When conduct occurs outside of work hours and on personal time with little impact back to the workplace:
 - Generally employers should not get involved about conduct that occurs during personal time if there is no workplace impact
 - Analyze the extent of potential workplace impact (For example, a DUI conviction for someone that has duties that require them to occasionally drive company vehicle)
 - And, check local laws for limitations

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Best Practices For Staying Ahead Of The Problem



- Train all employees and managers on policies and expectations
- Training should:
 - Be conducted regularly
 - Cover relevant and contemporary issues facing your employees
 - Help employees understand how some topics can be offensive and violate policy
 - Teach managers how to spot, address and prevent disrespectful conversations

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Intersection Between Harassment And Other Protected Categories



- **Peterson v. Hewlett Packard Co.** (9th Cir. 2004): employee properly terminated for displaying anti-homosexual biblical scriptures on cubicle in violation of employer's policy prohibiting harassment
- **Matthews v. Wal-Mart** (unpublished, 7th Cir. 2011): No violation of religious discrimination protections under Title VII when it discharged an employee for spouting religiously-inspired anti-gay bigotry on company premises during a work break in violation of company's policy

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™



What Do You Think:

Does your organization prohibit discrimination and harassment on the basis of sexual orientation and/or gender expression and, if so, what is the motivation for extending expressions?

LGBTQ Rights And Religious Freedom Battles



- EEOC:
 - Discrimination based on transgender status is sex discrimination in violation of Title VII
 - Denying access restroom corresponding to gender identity is sex discrimination
 - Contrary state law is not a defense
 - Sexual orientation is protected category (though case law sometimes holds it is not protected under Title VII)
 - Case law provides that sex discrimination under Title VII can include discrimination based an individual's failure to conform to gender stereotypes

LGBTQ Rights And Religious Freedom Battles



- Nearly Half of States Protect LGBTQ Worker Rights
 - Anti-LGBT rhetoric based on religion not a reasonable accommodation
- Local Laws
 - Broward County
- State Religious Freedom / Bathroom Bills:
 - Proposed laws in Mississippi, Texas and others that are similar to repealed North Carolina law which required individuals to use restrooms that correspond to sex on birth certificate
 - California: All single-user bathrooms must be identified "all gender" (effective 3/2017); proposed FEHA expansion of workplace protections based on transgender identity

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

LGBTQ Worker Rights Under New Administration



- President Obama signed 2014 Executive Order on LGBTQ Worker Rights for Federal Government Contractor Employers:
 - Imposes non-discrimination obligations for employers with certain federal government contracts
 - Added "sexual orientation" and "gender identity" as protected categories
 - New administration announced that it will continue to enforce the order to protect LGBTQ workers from discrimination
- President Trump repealed guidelines issued by Obama which allowed transgender children to use school bathrooms that correspond with gender identity

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

EEOC's New Study On Harassment



- Released June 21, 2016
- 70% of victims did not report harassment
- 50% of transgender respondents reported being harassed at work.
- 7% reported being physically assaulted at work because of their gender identity.
- 6% reported being sexually assaulted.
- 41% reported having been asked unwelcome questions about their transgender or surgical status.
- 45% reported having been referred to by the wrong pronouns "repeatedly and on purpose" at work.

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Allegations In *EEOC v. IFCO Systems NA*



- Lesbian employee harassed
- Supervisor commented regarding her sexual orientation and appearance
 - “You look good in a dress”
 - “I want to turn you back into a woman”
- Supervisor blew kiss, twirled tongue, etc.
- Employee complained
- Employer fired her
- Consent decree filed June 2016 required:
 - \$182,200 in monetary relief to aggrieved employee
 - \$20,000 donation to Human Rights Campaign Foundation
 - Training
 - Policy changes
 - Notices

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

Allegations In *EEOC v. Deluxe Financial*



- EEOC challenged employer’s refusal to let transgender woman use women’s restroom
- Consent decree filed January 2016 required:
 - Training
 - Policy changes
 - Notices
 - Apology and reference letter
 - \$115,000 in damages, \$40,000 of which covered attorneys’ fees

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™

New Developments in Courts of Appeal



- 11th Circuit
 - Evans v. Georgia Regional Hospital, March 10, 2017
- 7th Circuit
 - Hively v. Ivy Tech Community College, April 4, 2017



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™


How Should A Company Proceed Given Differences In Laws Based On Jurisdiction?



- Analyze company culture, values, and the law
- What does your company policy say?
 - A company may get into trouble for failing to comply with its own policies
- Even in jurisdictions where not protected, many companies are implementing EEO policies that include "sexual orientation" and "gender identity" as protected categories.
- Train all employees on harassment and discrimination - consistent with policy and culture
- Employees should be encouraged to report violations of policy to supervisor, HR, or another manager

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™



Final Questions



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™



THANK YOU
FOR THIS OPPORTUNITY

Candice C. Pinares-Baez
cpinares-baez@fisherphillips.com
(954) 847-4735

Abigail H. Kofman
akofman@fisherphillips.com
(954) 847-4714

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAW™
