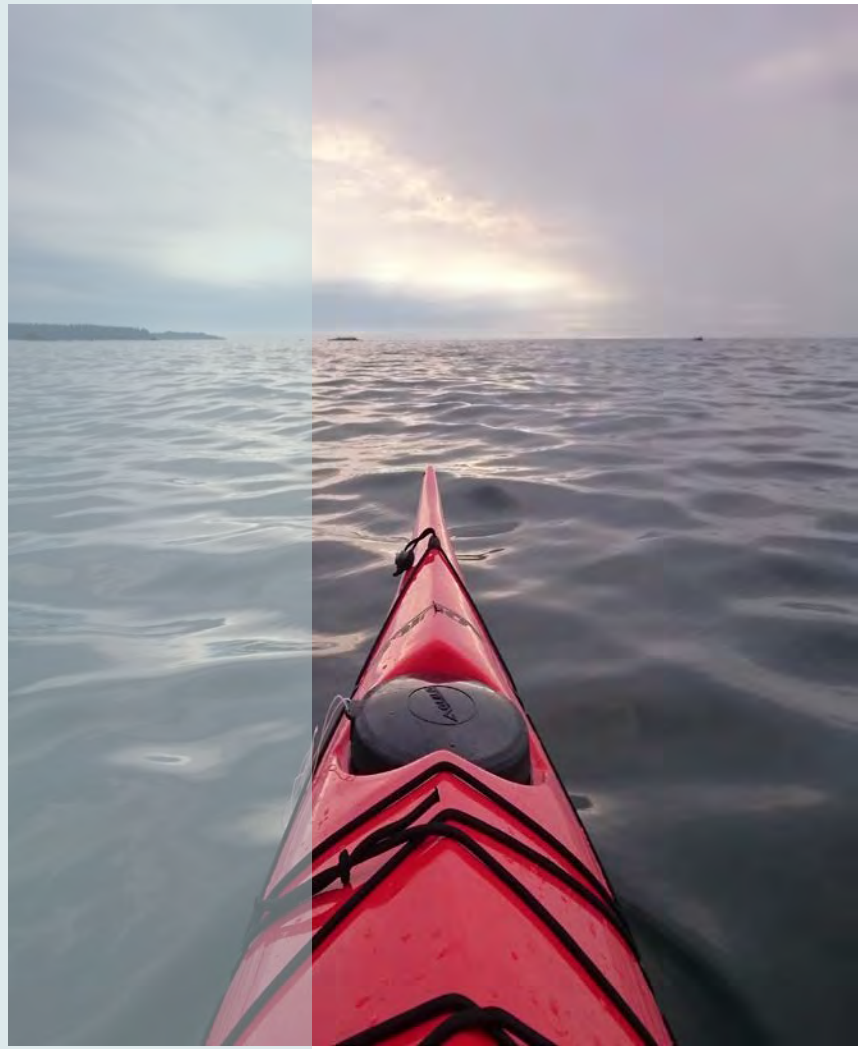
STAYING AFLOAT: NAVIGATING TRANSITIONS IN EMPLOYMENT LAW

September 19, 2023

Lauren Smith and Whitney Brown



TOPICS

The Impact on Employers of the *Students for Fair Admissions* Decisions

Religious Issues: New Reasonable Accommodation Standard for Employee Religious Practices and Where Religious-ish Employers and Non-Conforming Employees Intersect

New Legislation for Pregnant Women and Pumping Moms

Q&A

SFFA v. Harvard & UNC

- Overturned limited use of race-conscious admissions as constitutional exercise of academic freedom.
- Left schools open to consider a more nuanced view of diversity.
- Schools could still solicit essays on overcoming adversity, for example.

> "Outside the circumstances of these cases, our precedents have identified only two compelling interests that permit resort to race-based government action. One is remediating specific, identified instances of past discrimination that violated the Constitution or a statute. … The second is avoiding imminent and serious risks to human safety in prisons, such as a race riot."

SFFA v. Harvard & UNC: Impact for Employers

Other than mining the decision for talking points, this should have no impact on employers because even affirmative action employers are prohibited from considering race in employment actions.

SFFA v. Harvard & UNC: Impact on DEI initiatives

- Federal agency action aimed at federal contractors/subs
- Conflicting state legislation: CA attempted to require diverse representation; other states trying to squelch diversity as a talking point or measure of success
- Poorly done DEI initiatives will continue to be evidence of discriminatory intent or impact
- Shareholder actions

Response Letter from 10 Other Attorneys General to Fortune 100 Companies:

"While we agree with our colleagues that 'companies that engage in racial discrimination should and will face serious legal consequences,' we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful."

Groff v. DeJoy

(9-0)

"Clarified" (substantially strengthened) standard for employers to reasonably accommodate employee religious practices.

> "…Title VII requires that an employer reasonably accommodate an employee's practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations."

<u>Key Takeaways & Reminders:</u>

- Interactive process (essentially) required.
- Religious practice needs to be based on sincerely-held belief and spiritual (not political, social, or legal), but doesn't have to come from a religious organization.

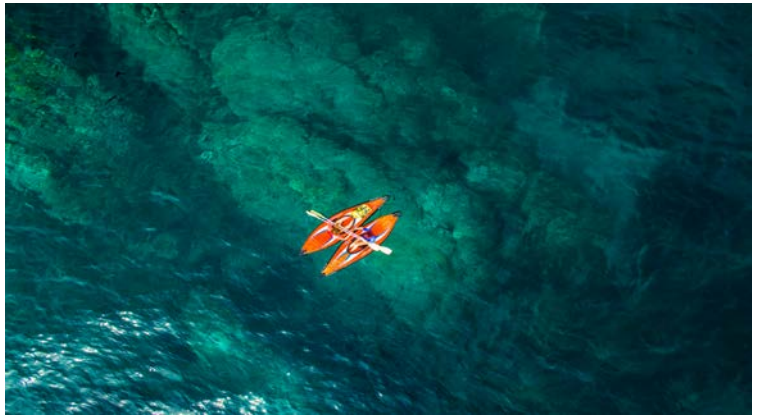
COMING SOON TO A CONFERENCE ROOM NEAR YOU: AN ARMCHAIR THEOLOGIAN WITH A GOOGLE LAW DEGREE:

EEOC Charge Filing Statistics				
	FY 2019	**FY 2020**	**FY 2021**	**FY 2022**
Total	72,675	67,448	61,331	73,485
Religion	2,725	2,404	2,111	13,814
	3.7%	3.6%	3.4%	18.8%

303 Creative LLC v. Elenis

(6-3)

- Wedding website designer couldn't be compelled to design for gay couples.
- There are many goods and services which don't implicate the First Amendment and those businesses must serve gay individuals under CADA (and other similar laws).



"In this case, Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance.... But, as this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider 'unattractive,' 'misguided, or even hurtful.' But tolerance, not coercion, is our Nation's answer." (citations omitted).

Braidwood Mgmt., Inc. et al. v. EEOC

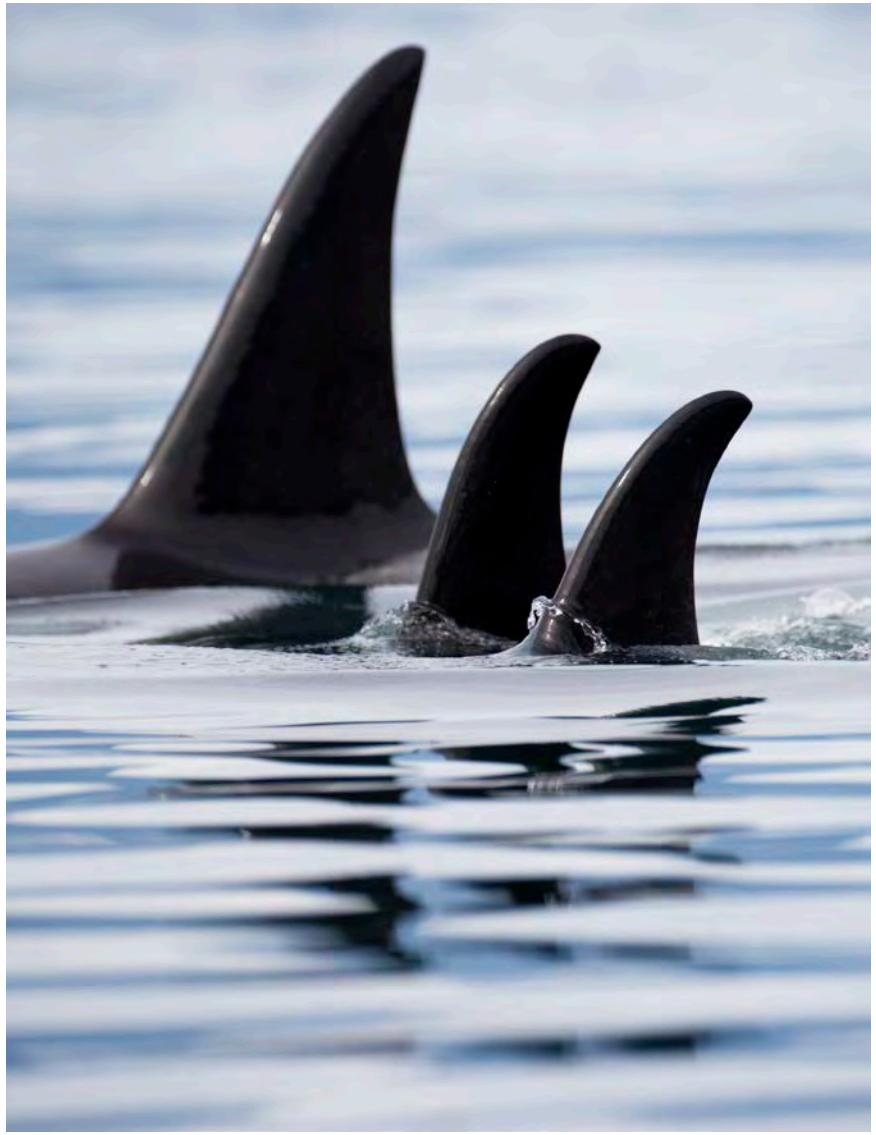
5th Cir.

- Very limited holding that mid-sized employer controlled by a person of strong religious convictions against promiscuous and gender-non-conforming behavior was entitled to an exemption under the Religious Freedom Restoration Act to complying with Title VII to the extent the post-*Bostock* interpretations conflicted with his belief.

Discussion: Where does this leave employers of transgender and other non-cisgender employees?

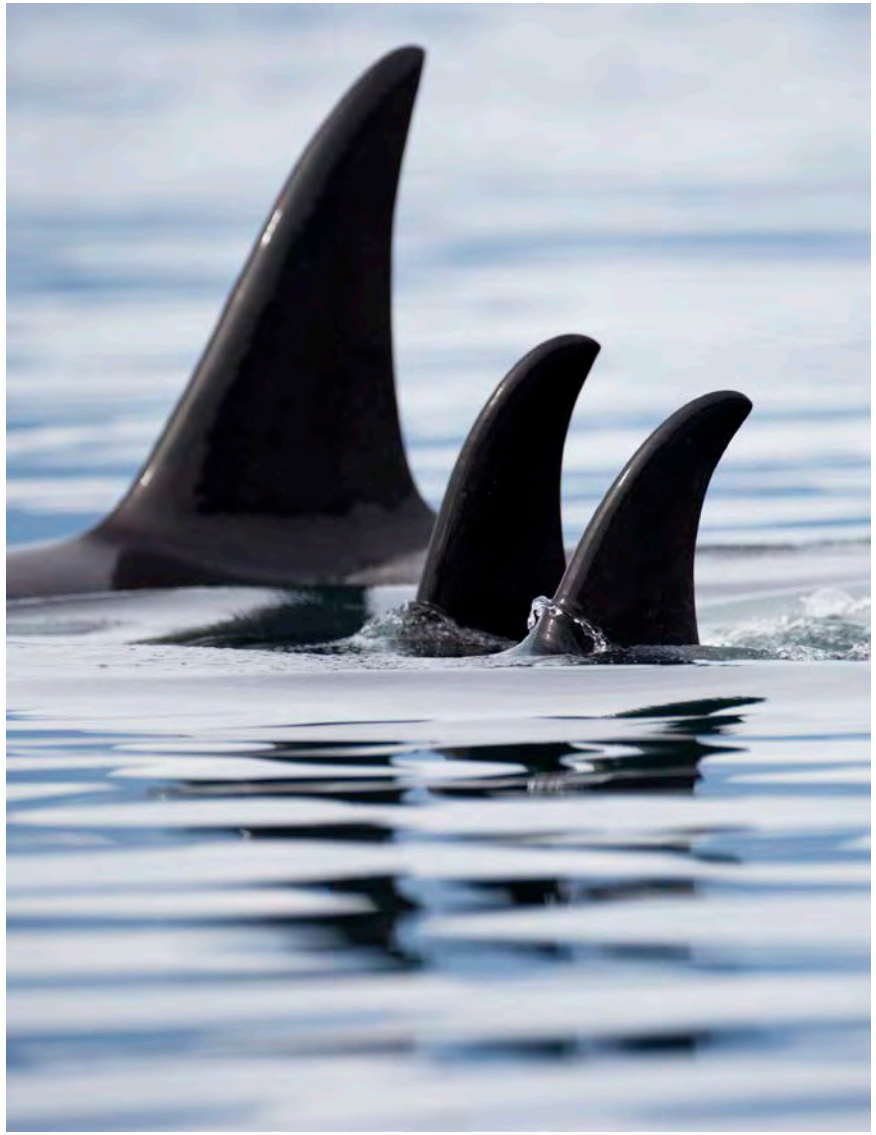
Pregnant Workers Fairness Act

- Reasonable accommodation required for known limitations caused by pregnancy, childbirth, or related medical conditions, except where it would impose undue hardship.
- Interactive process.
- Leave—paid or not—cannot be required if another accommodation could be provided.
- Opportunities can't be denied because of anticipated need for accommodation.
- No retaliation.



Pregnant Workers Fairness Act

- Good faith defense against damages if employer engaged in good faith efforts (including interactive process) to identify an accommodation that provided an "equally effective opportunity" but does not impose undue hardship.
- Effective 6/27/2023.
- EEOC regs published 8/11/2023, kicking off a 60-day review and comment period (ends 10/10/2023).
- Coverage and Charge Filing process = Title VII.



Pregnant Workers Fairness Act

Examples of Accommodations

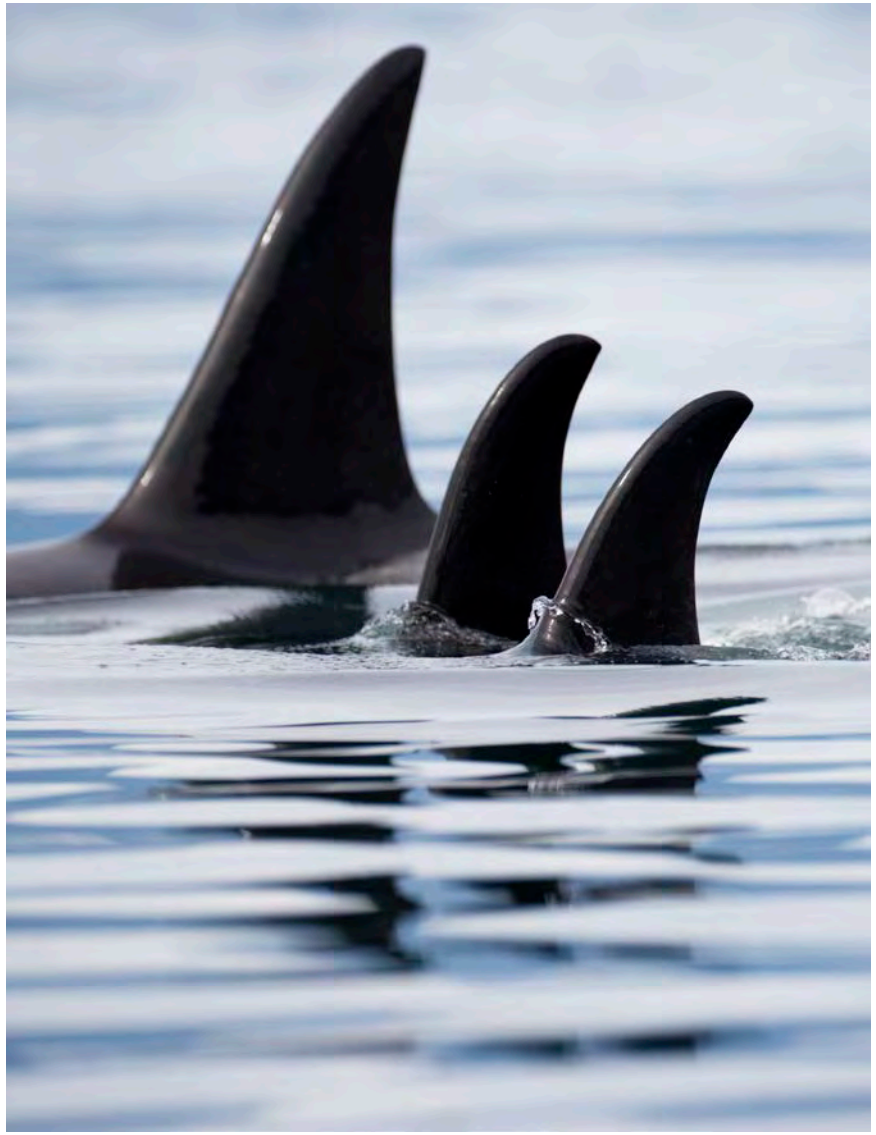
- Ability to sit
- Closer parking space
- Flexible hours
- Appropriately sized uniforms and safety equipment
- **Additional break time** for restrooms and rest.
- Excused from strenuous activity or dangerous substances, at employee's request.
- **Leave**
- **Task Reassignment**

Pregnant Workers Fairness Act

4 Surprising Differences Between ADA and PWFA or the PWFA statute and Proposed Regulations = 4 Traps For The Unwary Employer

1. No severity threshold to trigger obligation to accommodate.
2. Definition of qualified employees includes temporarily "unqualified" employees.
3. PWFA isn't a leave statute; PWFA proposed regulations are leave regulations.
4. Under PWFA proposed regulations, employers will be more limited in seeking medical information/verification than under the ADA.

Pregnant Workers Fairness Act



Surprise #1: No Severity Threshold

- Under ADA, employers are used to looking for a *substantial* impairment. But PWFA is not a disability statute.
- Qualifying impairments may also be more generic than expected; like "pain" or "I need to pee every hour."

Four Presumptively Reasonable Accommodations

- Toting water/drinks on person;
- Additional bathroom use;
- Posture breaks;
- Additional eating/drinking breaks.

Pregnant Workers Fairness Act

Surprise #2: Employees Who Can't Perform Job Functions for Over 6 Months? Still Qualified!!

PWFA (Statute):

"the term 'qualified employee' means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if –

(A) any inability to perform an essential function is for a temporary period;

(B) the essential function could be performed in the near future; and

(C) the inability to perform the essential function can be reasonably accommodated[.]"

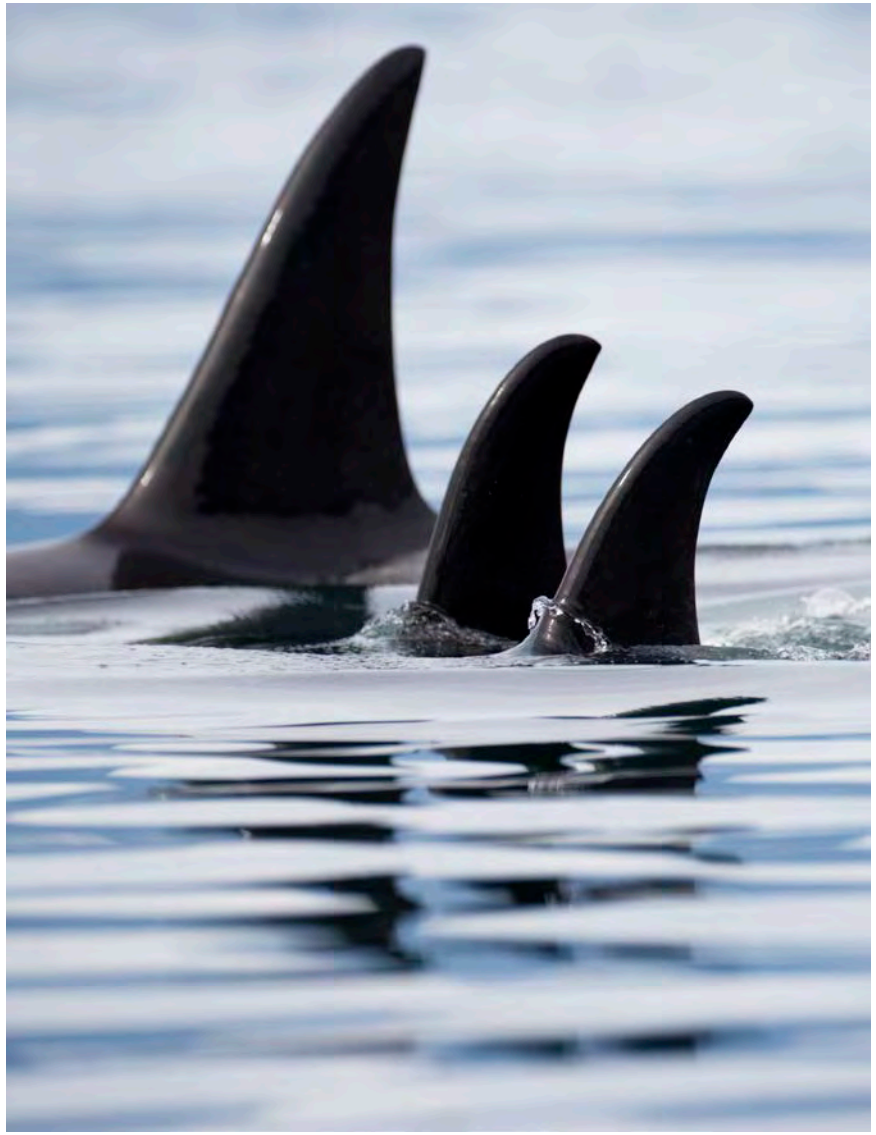
PWFA Proposed Regulations:

"an employee or applicant shall be considered qualified if they cannot perform one or more essential functions if …

(i) Any inability to perform an essential function is for a temporary period, where "temporary" means lasting for a limited time, not permanent, and may extend beyond "in the near future";

(ii) The essential function(s) could be performed in the near future, where "in the near future" means the ability to perform the essential function(s) will generally resume within forty weeks…

Pregnant Workers Fairness Act



Surprise #3: Emphasis on Leave as Accommodation (Prop. Regs.)

- # of times "leave" appears in statute?
  - 1 (One, uno, un, etc.). And it tells employers they can't force leave.
- # of times "leave" appears in proposed regs?
  - 22. Not counting the Appendix, where it appears ~165 times.

Pregnant Workers Fairness Act

Surprise #3: Emphasis on Leave as Accommodation (Prop. Regs.)

PWFA Proposed Regulations, 1636.3(f)(1)(i):

With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to perform the essential functions, with or without reasonable accommodation, at the end of the leave…or if the employee is qualified as set out in paragraph (f)(2) *after returning from leave*.

[(f)(2) details that an employee who is temporarily (<40 weeks) unable to perform an essential job function is not unqualified, if the inability can be accommodated.]

PWFA Proposed Regulations, Appendix:

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as a time when an essential function is suspended and thus is not relevant for the … definition of qualified.

Pregnant Workers Fairness Act

PWFA Proposed Regulations, Appendix:

Example 1636.3 #24/Unpaid Leave for Medical Appointments:

Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

….

The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

PWFA Proposed Regulations, Appendix:

Example 1636.3 #25/Unpaid Leave or Schedule Change:

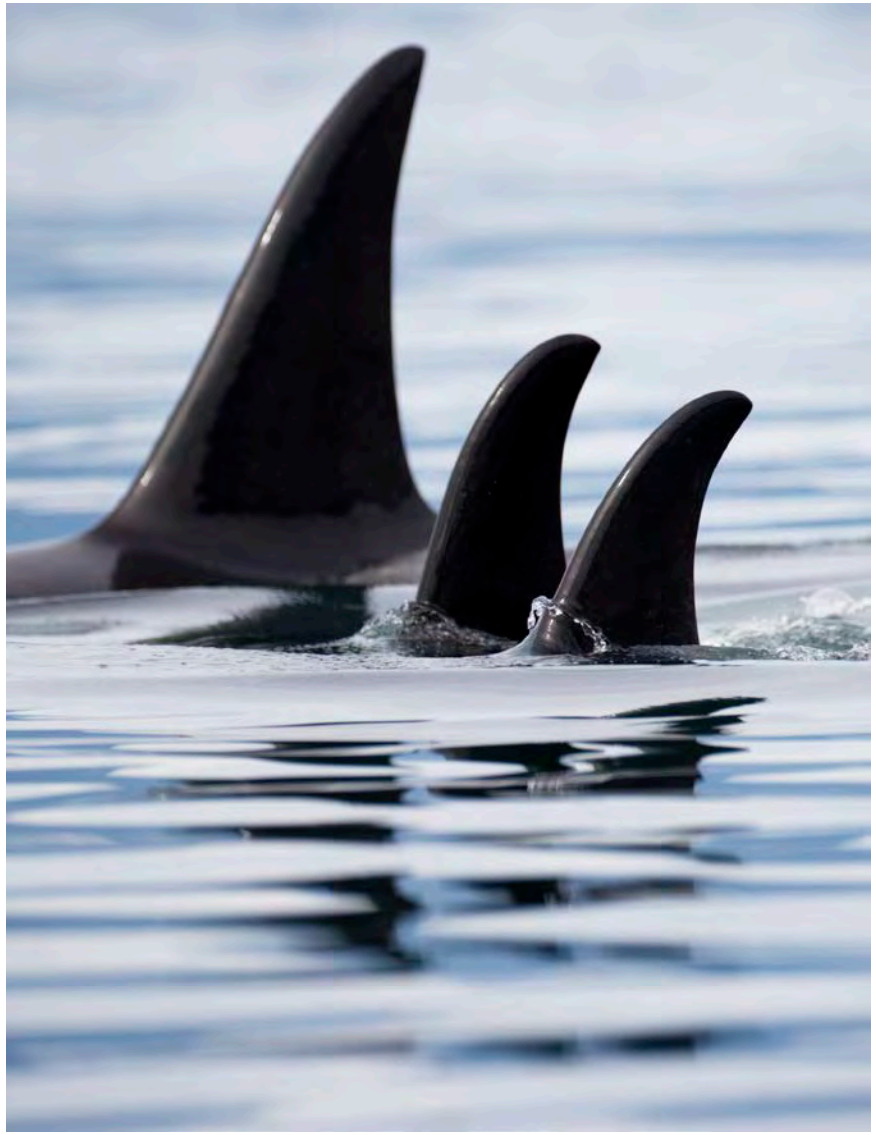
Claudine is six months pregnant and needs to have regular checkups. The clinic where Claudine gets her health care is an hour drive away, and they frequently get backed up and she has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine is not covered by the FMLA and does not have any sick leave left. Claudine asks human resources for a reasonable accommodation such as time off or changes in scheduling so she can attend her medical appointments.

…. The employer must grant the accommodation of time off or a schedule change (or another reasonable accommodation) absent undue hardship.

Pregnant Workers Fairness Act

Surprise #4: Limits on Authority and Leverage to Obtain Medical Confirmation

- Under ADA: employers have pretty broad authority to obtain medical examination or information to determine if a disability and accommodation-related information.
- The PWFA statute is silent as to this.
- PWFA proposed regs: Employer violates PWFA if it *delays* or denies implementing an accommodation due to an unreasonable request for documentation.



Pregnant Workers Fairness Act

Surprise #4: Limits on Authority and Leverage to Obtain Medical Confirmation (PWFA Proposed Regs)

Reasonable Requests

Requests for documentation describing or confirming:

- Physical or mental condition;
- That condition related to pregnancy, childbirth, or related condition;
- That change at work needed.

Unreasonable Requests

- Requests where need and pregnancy-relatedness are obvious.
- Requests where employee has already provided "sufficient *information*" to substantiate need.
- Four presumptively reasonable accommodations are requested.
- Lactation-related requests.

PUMP Act

- Expanded break obligation to FLSA exempt employees.
- Unpaid breaks to pump; but cannot dock pay of exempt employees.
- Must provide private, non-bathroom space.
- For first year of child's life.
- Undue hardship exemption for employers of fewer than 50 employees.
- Posting requirement.
- No retaliation.
- DOL already filed an enforcement action against a Whataburger Restaurant in San Antonio, Texas.

QUESTIONS AND ANSWERS

THANK YOU

Lauren Smith
Lauren.A.Smith@leidos.com

Whitney Brown
wbrown@lehrmiddlebrooks.com

2023 AL SHRM
EMPLOYMENT LAW CONFERENCE

NAVIGATING TRANSITIONS IN EMPLOYMENT LAW

SEPTEMBER 19, 2023

Presented by:
Lauren Smith
Whitney R. Brown

Lauren.A.Smith@leidos.com
wbrown@lehrmiddlebrooks.com

Lauren Smith
Lauren.A.Smith@leidos.com
256-975-0871

Position and Experience

Lauren Smith serves as the EEO and WR Consulting Director for Leidos, a federal contractor with approximately 47,000 employees, where she leads Equal Employment Opportunity and Affirmative Action strategy across the organization. She partners with Human Resources and other functional areas to provide guidance on emerging employment trends as well as reviewing existing policies and procedures to foster best practices. Prior to joining Leidos, Lauren was a litigation partner at a full-service business firm in Huntsville. During the majority of her 13 years in private practice, Lauren represented employers, both private and public, in a variety of employment-based matters in state and federal courts and before administrative agencies. As part of her practice, Lauren regularly advised clients on discrimination, harassment, retaliation, disability accommodations, wage and hour issues, medical leave, performance management, and investigations, among a few other things. Lauren also believes strongly in giving back to the community, serving on boards for the Women's Economic Development Council, the WEDC Foundation, and the Catalyst Center for Business & Entrepreneurship.

Education

- B.A. - Bachelor of Arts, California Polytechnic State University
- J.D. - Juris Doctor, McGeorge School of Law, University of the Pacific

Bar Admissions

- Alabama
- U.S. District Courts for the Northern and Middle Districts of Alabama
- U.S. Courts of Appeal for the Eleventh Circuit

LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C
LABOR • EMPLOYMENT • IMMIGRATION

Whitney Brown

wbrown@lehrmiddlebrooks.com
205.323.9274

P. O. Box 11945
Birmingham, AL 35202-1945
Phone 205.326.3002
Facsimile 205.326.3008
www.lehrmiddlebrooks.com

Position and Experience

Whitney R. Brown is a shareholder with the labor, employment and immigration law firm of Lehr Middlebrooks Vreeland & Thompson, P.C. Whitney represents employers in a range of employment litigation, including harassment and discrimination cases, Family Medical Leave Act, and cases involving state law claims.

Whitney leads the firm's Effective Supervisor® program on a regular basis and is also frequently invited to speak to clients, industry associations, and human resources groups about a variety of emerging trends in employment law. Whitney also co-heads LMVT's Affirmative Action compliance practice for clients covered by Executive Order 11246, Section 503 and VEVRAA, providing plan drafting and audit defense. This work provides Whitney with the background to review and in some cases conduct statistical analyses of workplace decisions (such as applicant selection or employee compensation). In 2020, Whitney trained as a civil rights investigator with the Association of Title IX Administrators.

Whitney has been recognized by *Chambers USA* in 2022 and 2023 as an up and coming attorney in her field. Additionally, for multiple years, Whitney has been named a Rising Star by *SuperLawyers*, a Top Attorney for Employment by *Birmingham Magazine*, and a Top Woman Attorney by *B-Metro Magazine*.

Notable Work

- Led the defense of the one of the largest multi-claimant Title VII suits filed in Alabama in defending an employer against allegations of racial favoritism in promotion decisions in a suit filed by the EEOC.
- Obtained dismissal of a case brought by the EEOC in the Southern District of Alabama alleging hairstyle discrimination. The Eleventh Circuit Court of Appeals affirmed the lower court's decision.

Education

- B.A. - Bachelor of Arts, Birmingham-Southern College
- J.D. - Juris Doctor, Vanderbilt University Law School

Bar Admissions

- States of Alabama and Mississippi
- U.S. District Courts for the Northern, Middle and Southern Districts of Alabama and the Northern and Southern Districts of Mississippi
- U.S. Courts of Appeal for the Fifth and Eleventh Circuit

I. The Impact on Employers of the Students for Fair Admissions Decisions

A. SCOTUS decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and UNC* (6-3)

1. Legal Background

   a. *Regents of the Univ. of Calif. v. Bakke* (1978): race cannot be the determinative factor but may be a factor used in admissions decisions. Plurality reached this conclusion under two theories:

      i. The educational benefits of a diverse student body was a constitutionally permissible goal for an institution of higher education; or

      ii. To remedy past societal discrimination.

   b. *Grutter v. Bollinger* (2003): SCOTUS affirmed the educational benefits rationale, adding that since race preferences were inherently suspect, continuing oversight was necessary, and continuing such programs in perpetuity was not appropriate.

2. Key Facts

   a. Both Harvard and UNC explicitly considered an applicant's race, among other factors, throughout the admissions process.

   b. The consideration of race appeared to have negative consequences for White and Asian applicants. Ex:

      i. At UNC, in the second highest academic decile, 83% of Black applicants were admitted, while only 58% of White and 47% of Asian applicants were admitted.

      ii. At Harvard, Black applicants in the top four academic deciles were 4-10 times as likely to be admitted as Asian applicants.

3. Ruling: Race-conscious decisions in admissions were unconstitutional.

   a. The educational benefits were subjective and not measurable.

   b. Selecting students based on six racial categories wasn't sufficiently related to the stated educational benefits.

   c. The practice had a negative effect on others, Asians especially.

   d. The Court rejected that an applicant's race alone provided diversity of outlook or student background.

   e. The schools had no end point in sight for the practice.

4. Immediate Employment Impact:

    a. Should be none, even for affirmative action employers.

        i. E.O. 11246 prohibits race and other protected-status-based actions.

        ii. E.O. 11246 requires mathematical assessments of employment practices to see if race or gender has an unexplained impact.

    b. Discuss what affirmative action in employment means and how it differs from what is commonly referred to as affirmative action in education.

B. <u>The Larger Picture: Legislative, agency, and other political actions; DEIB programs in litigation</u>

1. Legislation, EOs, Agency, and Political Action

    a. EO 13950 (Dec. 2020) sought to prohibit training on stereotyping and implicit bias by federal contractors (it was enjoined and withdrawn by Biden).

    b. Many states have passed or are considering legislation limiting or banning DEIB training or programming at public universities.

    c. Florida amended its Civil Rights Act to make it unlawful to require employees (of private employers) to attend training promoting eight prohibited topics, including (probably – as the statute is written consistently with the tone of the title of its enacting legislation as the STOP WOKE Act) systemic bias, implicit bias, and that "Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin."

        i. The court enjoining the law described this provision as "bordering on unintelligible…feature[ing] a rarely seen triple negative, resulting in a cacophony of confusion…It is unclear what is prohibited, and even less clear what is permitted." *Honeyfund.com, Inc. v. DeSantis*, 2022 U.S. Dist. LEXIS 147755, **35-36 (N.D. Fla.).

    d. California state law would require California companies to have women and minority or LGBTQ board members (enjoined).

    e. Letters to employers by legislators and A.G.s reiterating the law on discrimination

2. Notable cases:

   a. *Duvall v. Novant Health, Inc*. (on appeal to 4th Cir.): Duvall was hired as Novant's SVP of Marketing and Communications, and, a jury found, fired, and replaced with two women, one Black, as part of Novant's specific Strategic Plan to make its leadership and workforce mirror the community.

      i. The jury awarded $10 million, adjusted to $4.6 million.

      ii. DEIB plans, reports, and off-the-cuff remarks will continue to be used as evidence of discrimination.

   b. Shareholder suits – case pending against Wells Fargo for its requirement that 50% of interviewees for $100,000+ positions be from historically underrepresented groups, resulting in alleged sham interviews which were the subject of adverse media coverage, after which WF's price dropped 10%.

      i. Could similar suits be brought by shareholders opposed to DEIB?

II. Religious Issues

A. New Reasonable Accommodation Standard for Employee Religious Practices: *Groff v. DeJoy* (9-0)

1. Legal Background:

   a. Title VII requires that employers must accommodate employees' religious practices unless doing so imposed an undue hardship.

   b. Trans World Airlines, Inc. v. Hardison (1977): [Everyone understands that SCOTUS said] undue hardship means anything more than a de minimis cost.

2. Key Facts:

   a. Groff, an evangelical Christian, was a Rural Carrier Associate for USPS.

   b. When Groff took the position, it didn't require Sunday work.

   c. In 2013, USPS agreed with Amazon to facilitate its Sunday deliveries.

   d. In 2016, USPS and Groff's union agreed on how Sunday and holiday deliveries would be handled.

   e. Though pursuant to the CBA Groff was in line for some Sunday work, he never actually worked Sundays. His post office co-workers and other regional co-workers were assigned his Sunday work.

f. Those co-workers complained, and at least one filed a grievance *under the CBA* which USPS settled.

g. Groff was continually disciplined for his failure to work Sundays, until he resigned, allegedly out of anticipation of termination.

3. Ruling: "Undue hardship" requires a substantial increased cost in relation to the conducting of the employer's overall business, not just anything more than a *de minimis* cost.

a. May include *effects* on co-workers, if *they* affect business operations.

b. Employers must consider all viable options, not just the one the employee requests.

c. Court rejected Groff's request to make Title VII's religious accommodation standard synonymous with ADA.

d. Groff's case was remanded, because applying the incorrect standard "may have led the court to dismiss a number of possible accommodations, including those involving the cost of incentive pay, or the administrative costs of coordination with other nearby stations with a broader set of employees."

B. <u>Where Religious-ish Employers and Non-Conforming Employees Intersect</u>

1. *303 Creative LLC v. Elenis* (6-3)

a. Legal Background

i. Colorado Anti-Discrimination Act (CADA) required businesses of public accommodation to provide full and equal enjoyment of their services/products to any customer without regard to protected classes, including sexual orientation.

ii. The First Amendment Free Speech clause includes the right to express opinion or refuse to adopt viewpoints of others.

(a) Even though the web designer's opinions were religiously-based, this is not a Free Exercise/RFRA case.

b. Facts

i. Lorie Smith was the sole owner and employee of a graphic and website design business.

ii. She has never created a business webpage which contradicted her personal beliefs, such as by encouraging violence.

iii. She wanted to expand to designing wedding websites.

iv. She planned to use fully custom designs and to include her company name on all wedding websites.

v. She didn't go through with her business plan due to fear she'd be found in violation of CADA if she refused to design a website for a same-sex couple.

vi. Other than this, Ms. Smith was willing to work with clients regardless of sexual orientation (such as to design a website for a business owned by a lesbian).

vii. Rather than open this line of business and wait to be sued, she sued for preemptive relief.

c. Ruling: Smith could not be compelled to create speech (websites) celebrating unions she didn't agree with.

i. The wedding websites would be "pure speech."

ii. The wedding websites would be Ms. Smith's speech.

(a) Ms. Smith's relationship to her web designs were compared to a speechwriter who may select his clients, a film director's selecting a movie, a muralist refusing a commission, and other visual artists.

iii. Ms. Smith couldn't be compelled to repurpose a design she'd make for a heterosexual couple into one for a same-sex couple.

iv. There are many goods and services which don't implicate the First Amendment and those businesses must serve gay individuals under CADA (and other similar laws).

2. *Braidwood Mgmt., Inc. and Bear Creek Bible Church v. EEOC* (5th Cir. 2023)

a. Facts:

i. Braidwood manages three entities owned by Steven Hotze, who runs them as "Christian businesses." The businesses together employ about 70 people.

ii. Mr. Hotze refuses to employ individuals engaged in behavior he finds sexually immoral or gender non-conforming, including gay marriage; he enforces a sex-specific dress code based on an employee's sex at birth.

iii. Braidwood sued the EEOC seeking preemptive judgment that it was entitled to exemptions under post-Bostock Title VII enforcement under the Religious Freedom Restoration Act (RFRA), the Free Exercise clause, the Expressive Association clause, and that two of its policies didn't actually violate Title VII.

b. Ruling: Braidwood was due an exemption under the RFRA.

i. The Appeals Court did not decide on the First Amendment arguments.

ii. It also vacated on technical grounds the lower court's Title VII decisions that

(a) employers violated Title VII if they discriminated against bisexuals or prohibited employees from taking hormone therapy or undergoing sex-reassignment surgery;

(b) but that the employers did not violate Title VII by enforcing sexual ethic policies applied equally to heterosexual and same-sex behavior and that employers could have sex-specific dress codes and sex-specific restrooms.

c. What are the guideposts for transgender employees?

i. EEOC:

(a) "The Commission has taken the position that employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee's gender identity."

(b) Use of pronouns other than those used by the individual may be harassment. Factors to consider include frequency and intent.

(c) Employees may not be required to dress in accordance with sex assigned at birth.

ii. *BFOQ* defense: assigning jobs by gender can be justified if gender is a bona fide occupational qualification (BFOQ). This is a difficult affirmative defense. *Historically-recognized e*xamples of BFOQ situations include: same-sex role models (this would typically require a client/patient base with some sort of diminished capacity *or therapeutic need*); contact positions in institutional settings (such as prisons, where cavity searches may be required); contact positions in sex-segregated facilities (this has included retailers as examples, but I have doubts that the defense would hold except for undergarment-specific stores/departments).

III. New Legislation for Pregnant Women and Pumping Moms

A. <u>The Pregnant Workers Fairness Act</u>

1. Key Stats:

a. Effective June 27, 2023 (so applies to alleged violations occurring on or after that date).

b. Coverage synonymous with Title VII as far as employer size, and covering applicants and employees.

c. EEOC administrative coverage and exhaustion requirement.

2. Key Provisions:

a. Employer must reasonably accommodate the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee except where it would impose undue hardship;

b. Employer must engage in interactive process to arrive at reasonable accommodation;

c. Employer must not require leave—paid or not—if another reasonable accommodation can be provided;

d. Employer must not deny opportunities because of anticipated need to make reasonable accommodations;

e. Employer must not retaliate for requesting or using accommodation.

f. Employer must not retaliate for opposing violations of this law or participating in an investigation, Charge, or suit under PWFA.

g. Employer may access good faith defense against damages if it can demonstrate good faith efforts (including consultation with employee) to identify a reasonable accommodation that provides “an equally effective opportunity” but does not cause undue hardship.

3. Examples of Accommodation from Proposed Regulations, U.S. House Committee Report, Informal Guidance, and Reasonable Inferences from the EEOC’s PDA Litigation

   a. The ability to sit while working;

   b. A parking space closer to the workplace;

   c. Flexible hours;

   d. Receive appropriately sized uniforms and safety apparel;

   e. Receive **additional break time** to use the restroom, eat and rest;

   f. Be excused upon request by pregnant employee from either strenuous activities or activities that involve exposure to substances that are not safe during pregnancy;

      i. Note: employers still may not initiate removing an employee from such activities.

   g. Leave:

      i. Emergency leave (see Walgreens PDA case below);

      ii. Leave for appointments;

      iii. Leave to recover from childbirth (particularly if the employee is not eligible for FMLA);

      iv. Leave for a temporary defined period if employee unable to perform essential functions;

   h. Task Reassignment

      i. Including limited duration task assignment of essential functions if not an undue hardship in the short term.

4. What hole does the PWFA fill; *i.e.*, how is it existing from remedies and solutions under PDA, FMLA, ADA?

   a. PDA (Pregnancy Discrimination Act)

      i. PWFA creates express accommodation obligation; PDA prohibits differential (discriminatory) accommodation, de facto requiring a comparator.

   b. FMLA (Family Medical Leave Act)

      i. Covers employers with 15 or more employees – not 50 employees like FMLA

ii. Coverage begins immediately – without FMLA type of waiting period

c. ADA (Americans with Disabilities Act)

i. Employee need not establish disability

ii. Accommodation can allow for temporary suspension of essential job functions

5. Critical Aspects of Proposed PWFA Regs (issued 8/11/23):

a. Employer has to accommodate non-severe limitations.

i. Presumptive four accommodations: to carry a drink, additional breaks for drinking/eating, additional breaks for bathroom use, sit/stand breaks.

b. Employees unable to perform essential job functions for up to 40 weeks may still be qualified because apparently 40 weeks = the near future.

i. Each period of inability is unique, so (per EEOC/proposed regs) multiple periods of inability can be stacked and are not aggregated.

ii. This is a ***huge*** deviation from ADA case law. While employers may not have automatic termination triggers, if an employee is unable to perform a job's essential functions for six months are more, they will almost always be unable to show they were a qualified individual.

c. Proposed regulations would turn this into an FMLA expansion:

i. Expansion to small employers

ii. Expansion to FMLA-ineligible employees

iii. Expansion to post-FMLA-exhaustion employees

d. Hostility to employer requests for information.

e. Almost every PWFA case will require employer to prove undue hardship.

6. Impact on Employers: Pregnancy claims, while not significant in number as far as national charge filings (they tend to be 3-5% of EEOC Charges filed), are a significant priority for EEOC enforcement. Additionally, if proposed regulations remain generally unchanged, unwary employers will fall victim.

a. EEOC filed just 91 merits lawsuits in FY 2022: 42 had a sex claim; 6 of those included a pregnancy claim.

b. EEOC Press Room – recent PDA filings and resolutions

i. 4/12/2023: Nursing Facility Symphony of Joliet to Pay $400,000 to Settle EEOC Pregnancy Discrimination Suit

   "In its lawsuit, the EEOC charged that Symphony, a skilled nursing and rehabilitation facility, implemented a policy **requiring employees to inform the company of any pregnancy** and **to obtain a note from their doctor** releasing **them to work without restrictions."** [emphasis added]

ii. 11/9/2022: Circle K to Pay $8 Million to Resolve EEOC Disability, Pregnancy, and Retaliation Charges

   This pre-litigation settlement also included the company's agreement to "update its policies, as needed [which still included a 100% healed policy(!!)]; appoint a coordinator to provide oversight on pregnancy-related disability policies, requests for reasonable accommodations, and maintenance of records; conduct climate surveys and exit interviews with specific attention to their accommodation process; conduct anti-discrimination training to all employees, including management; and require performance evaluation of managers include consideration of compliance with EEO laws. This settlement is in effect for four years."

iii. 9/28/2022: Walgreens Sued by EEOC for Pregnancy and Disability Discrimination

   "No one should have to choose between losing a pregnancy and losing a job," said Andrew Kingsley, a senior trial attorney in the EEOC's New Orleans Field Office.

iv. 4/26/2022: DLS Engineering Associates to Pay $70,000 to Settle EEOC Pregnancy Discrimination Lawsuit

   "According to the EEOC's suit, DLS offered a woman a position as an engineering logistics analyst in Jacksonville, Florida. After she told the company's vice president that she was five months pregnant, he rescinded her offer, explaining the company could not hire someone who was pregnant."

B. PUMP Act

1. Expanded right to break time and a private place for pumping to exempt employees.
2. Eligible employees:
    a. Basically any pumping/nursing mom for the first year of her child's life.
3. Private place:
    a. Not a bathroom.
    b. Shielded from view.
    c. Free from intrusion.
    d. Does not have to be permanent or only for pumping (e.g., it could be a supervisor's office or conference room that an employee reserves).
4. Frequency of breaks: Determined by mother.
5. Paid or unpaid?
    a. Unpaid for nonexempt workers; salaried exempt employees cannot have pay docked.
6. Exceptions:
    a. Certain airlines, railroads, and motorcoach carriers.
    b. Employers with fewer than 50 employees (total, not just at work site) are eligible to assert an undue hardship defense, if one actually exists.