On February 20, 2018, NBC News published a story entitled “#MeToo in medicine: Women harassed in hospitals and operating rooms, await reckoning.” The story profiled multiple female physicians at Loma Linda University Medical Center in Loma Linda, California, some of whom complained of experiencing sexual harassment at the hands of supervising male physicians during residency programs. In addition to its commentary on cultural backlash against sexual harassment and sexual assault, the article also raises interesting and timely legal questions concerning medical residents’ rights—and hospitals’ obligations—when it comes to discrimination and harassment in residency programs.

Traditionally, Title VII of the Civil Rights Act of 1964 has provided a remedy for claims of discrimination and harassment in employment. While there seems to be little doubt that medical residents are “employees” for purposes of Title VII, medical residencies are uniquely distinct from the traditional definition of an employee, in that they are by design a continuation of medical education and training. Some courts have held that medical residencies are most akin to apprenticeship programs wherein employees receive on-the-job training to learn a skill. See Gollas v. Univ. of Tex. Health Sci. Center at Houston, 425 Fed. App’x. 318 (5th Cir. 2011) (implying that because medical residents are entitled to sue under Title VII, they must also be considered employees under Title VII); see also Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 161 (1999) (stating that residents “bear a close analogy to apprentices in the traditional sense . . . . Nor does the fact that . . . residents . . . are continually acquiring new skills negate their status as employees. Members of all professions continue learning throughout their careers and many professions, including those in the healthcare industry, require individuals to be trained further after graduation in order to be licensed and received in the field.”) (citations omitted); see also Johnson v. Baptist Med. Ctr., 97 F.3d 1070, 1072 (8th Cir. 1996) (“Although the residency program combines features of both employment and academic study, it appears to be primarily an employment setting not unlike an apprenticeship.”).

Title IX of the Education Act Amendments of 1972, however, states that no person, “shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” 20 U.S.C. § 1681(a) (2018). The primary purpose of this statute is to prevent entities that receive federal financial assistance from using the funds in a discriminatory manner. Gebser continued on page 10
Associate Newsletter Editor, Joanne Roskey recently caught up with Section Chair Don Slesnick to talk about the new membership initiatives being considered by the ABA Board of Governors and House of Delegates. The proposed changes to the structure of the dues categories and accompanying benefits will hopefully have a positive impact upon our Section and its members.

Here's a synopsis of their conversation:

**Joanne:** Thank you for taking the time to speak with us about the year-long debate regarding the “New Membership Model” proposal. What caused the ABA to consider such sweeping changes to the dues and member benefits structure?

**Don:** For years the ABA's membership roster, like many other voluntary service/professional organizations, has been decreasing. Understandably, with a decline in membership the ABA's financial position has suffered. Leadership determined that a critical point had been reached and that action was needed. The time had come for radical change in the association's approach to membership to reverse the negative trends which would ultimately lead down the road to organizational collapse.

**Joanne:** Did the ABA study the problem before attempting to solve it?

**Don:** Yes. The ABA contracted with professional social scientists to conduct comprehensive opinion surveys of the current membership and of a large sample of non-member lawyers as to what the Association could do to be more attractive to the 21st Century legal community. There were also consultations with public relations and advertising consultants as to how the organization could position itself for gaining new members and retaining current members.

**Joanne:** What are the major components of the proposal being considered by the Association?

**Don:** The proposals currently under discussion are (1) the reduction in the number of dues categories; (2) an across-the-board lowering of dues amounts; (3) the creation of an extensive CLE library with free access for members; and, (4) free membership in the Law Practice Division, the GP Solo/Small Firm Division and the Center for Professional Responsibility. Free membership for law students will continue (our section has about 5,500 law student members).

**Joanne:** What will be the major impact to our Section of the new membership model?

**Don:** Our current members will experience a reduction in the cost of ABA membership (that’s very good), and they will be able to receive the excellent materials published by the Law Practice and GP Solo Divisions. They will also have access to a free on-line library with scholarly research and CLE materials supplied by all the various sections of the association. Additionally, the promise of attracting new members may be realized with the lower dues structure which, for example, offers a no fee membership for first-year bar admittees followed by a low $75 membership for years of practice 2 through 4 and $150 for years of practice 5 through 9. Of special interest is the $150 rate for government lawyers, solos and small firms (after entering their fifth year of practice).

**Joanne:** Has the Section had input into the on-going discussions concerning the New Membership Model?

**Don:** Yes. Past Section Chair, Bernie King, has been an active participant in the discussions/debates as a member of the Board of Governors. One of our Budget Chairs, Jules Smith, was elected to represent all the Sections’ finance officers as part of the Section Officers Council input. I was appointed to the “Working Group” comprised of about 50 persons representing many component entities of the organization. The “Group” has met telephonically once a week for the past nine months and twice in face-to-face meetings at ABA headquarters to thoroughly examine all aspects of the proposal. Our Director, Brad Hoffman has been active in on-going staff discussions. Those of us representing the Section of Labor and Employment Law have used every opportunity to express the concerns and aspirations of our members in order to derail earlier proposals which would have challenged the future financial viability of our Section. We are very pleased with the resulting recommendations which will now be presented to the Board of Governors and the House of Delegates for adoption.

**Joanne:** When can we expect to hear more about when these proposals might go into effect?

**Don:** As we head into the Annual Meeting the Board and House of Delegates will consider formally adopting these proposals. By the time this Newsletter lands on your desk, the New Membership Model should be headed for implementation.

**Joanne:** Thanks very much, Don. I’m sure Section members will be interested in hearing more about these membership initiatives in the months ahead.

**Don Slesnick** is a Partner in the Coral Gables, Florida office of Slesnick and Casey LLP. He became Chair of the Section on August 5, 2017.

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**Associate Newsletter Editor**

Joanne Roskey is a partner in the labor and employment practice group at Casey, Allison & Hachtman, PC, in Chicago. She advises clients in a variety of industries on collective bargaining, grievance arbitration, and labor law compliance. She is also the co-chair of the ABA’s Section of Labor and Employment Law (Selleck). She can be reached at jroskey@cah.com.

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Federal Circuit Courts Continue to Extend Title VII Protections to LGBT+ Individuals

By Amber M. Rogers and Jennifer Jones

While many states and municipalities have created laws protecting LGBT+ employees from workplace discrimination, the federal protections offered to LGBT+ individuals in the workplace remain in a state of flux. Notably, there is no federal law which explicitly prohibits employment discrimination against individuals because they are LGBT+, as Title VII only expressly prohibits employment discrimination on the basis of race, color, religion, sex and national origin. There is, however, a growing trend among federal courts interpreting Title VII to include a prohibition against discrimination on the basis of sexual orientation or transgender status.

The Beginning of the Trend
Recent decisions by the Second and Sixth Circuits are on the heels of the Seventh Circuit’s landmark decision in Hively v. Ivy Tech Community College of Indiana in April of 2017, wherein it became the first federal circuit court to expressly find that Title VII’s protections extend to sexual orientation. These decisions were made in a climate where both state and federal agencies are providing a patchwork of protections to LGBT+ individuals in the workplace. For example, the EEOC announced in 2015 that it would begin interpreting and enforcing Title VII as prohibiting employment discrimination based on sexual orientation and gender identity. Also, in May 2018, the Michigan Civil Rights Commission announced it will now process LGBT+ discrimination claims under its state civil rights law, joining approximately 20 other states with similar bans on LGBT+ discrimination.

The Trend Continues
In late February of 2018, the Second Circuit became the second federal circuit court to explicitly find that Title VII’s protection extends to employment discrimination based on sexual orientation. Zarda v. Altitude Express involved a claim by a sky diving instructor that his former employer terminated his employment because he was gay. In finding that the sky diving instructor had a cognizable claim under Title VII, the Second Circuit held that (1) sexual orientation discrimination is motivated, at least in part, by sex and thus is a subset of sex discrimination for purposes of Title VII, and (2) the plaintiff was therefore entitled to bring a claim for sexual orientation discrimination under Title VII.

The Second Circuit relied on a number of different theories to support its holding. First, the Court found that “the most natural reading” of Title VII, which prohibits discrimination “because of . . . sex,” would extend to sexual orientation discrimination because “sex is necessarily a factor in sexual orientation.” It reasoned that because an individual’s sexual orientation cannot be defined without first identifying the person’s sex, “sexual orientation is a function of sex.” Additionally, the Court relied on the theory of gender stereotyping first recognized in 1989 in Price Waterhouse v. Hopkins by the Supreme Court, wherein the Court concluded that adverse employment actions taken based on the belief that a female accountant should conform to gender stereotypes of females amounted to sex discrimination under Title VII. Applying the Price Waterhouse reasoning, the Second Circuit found that an employer who takes an adverse action based on the belief that men should be attracted to women is “directly related to our stereotypes about the proper roles of men and women.” Finally, the Second Circuit relied upon the theory of associational discrimination, and concluded that discrimination based on an employer’s opposition to association between particular sexes constitutes discrimination “because of . . . sex.”

In March of 2018, the Sixth Circuit issued its decision in EEOC v. R.G. G.R. Harris Funeral Homes, where a funeral home worker claimed her former employer terminated her employment because she was transgendered and undergoing gender transition. The Sixth Circuit relied on a number of different theories to support its holding. First, the Court found that “the most natural reading” of Title VII, which prohibits discrimination “because of . . . sex,” would extend to sexual orientation discrimination because “sex is necessarily a factor in sexual orientation.” It reasoned that because an individual’s sexual orientation cannot be defined without first identifying the person’s sex, “sexual orientation is a function of sex.” Additionally, the Court relied on the theory of gender stereotyping first recognized in 1989 in Price Waterhouse v. Hopkins by the Supreme Court, wherein the Court concluded that adverse employment actions taken based on the belief that a female accountant should conform to gender stereotypes of females amounted to sex discrimination under Title VII. Applying the Price Waterhouse reasoning, the Second Circuit found that an employer who takes an adverse action based on the belief that men should be attracted to women is “directly related to our stereotypes about the proper roles of men and women.” Finally, the Second Circuit relied upon the theory of associational discrimination, and concluded that discrimination based on an employer’s opposition to association between particular sexes constitutes discrimination “because of . . . sex.”

In March of 2018, the Sixth Circuit issued its decision in EEOC v. R.G. G.R. Harris Funeral Homes, where a funeral home worker claimed her former employer terminated her employment because she was transgendered and undergoing gender transition. The Sixth Circuit relied on many of the same theories as the Second Circuit, in R.E. G.R. Harris Funeral Homes, finding that compelling the funeral home to comply with Title VII was “the least restrictive means of furthering the government’s compelling interest in eradicating discrimination . . . on the basis of sex.”

While these two decisions are a part of a larger trend of federal courts expanding the reach of Title VII to offer its protections to members of the LGBT+ community, not all courts have followed the same logic recently employed by the Second and Sixth Circuits. For example, in March of 2017, in Evans v. Georgia Regional Hospital, the Eleventh Circuit declined to extend Title VII protection to the claims of a lesbian employee who alleged she was terminated based on her sexual orientation. While the court recognized that a sex discrimination claim under Title VII alleging an adverse action for failure to confirm to gender stereotypes is cognizable, a claim under Title VII alleging sexual orientation discrimination is not.

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The NLRB Recusal Standard: How Will Hy-Brand, The Inspector General, and a Federal Regulation Affect Employees and Employers?

By Gary Enis and Sara Hamilton

Despite years of litigation, the joint employer standard and other far-reaching decisions of the National Labor Relations Board ("Board") may be in limbo yet again, but not because of the newfound Republican-majority Board. Though holdings of the five-member Board often shift with the Board's composition, this time a federal ethics regulation is poised to create uncertainty in federal labor law. What is the current controversy and how will it affect employers?

Bench Brief: Hy-Brand Industrial Contractors, Ltd.
The current controversy began with Hy-Brand Industrial Contractors, 365 NLRB No. 156 (2017). In Hy-Brand, the Board voted 3-2 to overrule Browning-Ferris Industries, 362 NLRB No. 186 (2015), a seminal case in which the Obama-era Board adopted a new joint employer standard. Describing Browning-Ferris as a "distortion of common law," the Board in Hy-Brand returned to the pre-Browning-Ferris joint employer standard, which many argued was more management-friendly. Thus, Hy-Brand was considered a favorable case for employers.

However, on February 26, 2018, the Board vacated Hy-Brand because it determined that Board Member William Emanuel, a Trump appointee, should have recused himself for having an alleged conflict of interest. With Member Emanuel's vote removed, Hy-Brand became a 2-2 tie thus reinstating Browning-Ferris as the applicable joint employer standard.

Executive Order 13770: What Does "particular matter involving specific parties" Mean, Exactly?
The Board's decision to vacate Hy-Brand was based on a February 9, 2018 Memorandum by the Board's Inspector General, David P. Berry, in which he raised a "serious and flagrant problem" with Member Emanuel's participation in the Hy-Brand case. Instead, he found, Member Emanuel should have recused himself pursuant to Executive Order 13770 (Jan. 28, 2017).

Executive Order 13770, intended to be an ethics pledge, contractually forbids Trump appointees in the Board from participating in "any particular matter involving specific parties that is directly and substantially related to [their] former employer or former clients" during the first two years of service. Executive Order 13770, at ¶ 6. Because Member Emanuel's former law firm represented Leadpoint, a party in Browning-Ferris, he should have recused himself from Hy-Brand, reasoned the Memorandum.

The Inspector General's interpretation of the recusal standard in Executive Order 13770 is notable for legal and political reasons.

First, to reach his conclusion, the Inspector General broadly interpreted the term "particular matter involving specific parties." The Executive Order adopted a definition contained in 5 CFR § 2641.201 for the term "particular matter involving specific parties." Under this regulation, two matters can be considered the same matter based on a review of factors "including the extent to which the matters involve the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed." 5 CFR § 2641(h)(5).

Though Browning-Ferris and Hy-Brand both shared a common issue—the joint employer standard—they were decided two years apart, by different Boards having two different members, and involved different parties, facts and confidential information. Despite these differences, the Inspector General found that the two cases could not be separated because the Browning-Ferris dissent became the Hy-Brand majority decision. Accordingly, Browning-Ferris was sufficiently central to Hy-Brand's deliberative process to constitute a "particular matter involving specific parties." And, because the cases were considered the same matter, Member Emanuel should have recused himself from Hy-Brand because his former law firm, Littler Mendelson, had represented Leadpoint, a party in the Browning-Ferris.

Second, the Inspector General’s broad interpretation of the recusal standard had some claiming that he applied a double standard. The application of 5 CFR § 2641.201 to ethically bind political appointees actually originated with President Obama, who first incorporated the regulation in a similar ethics pledge, Executive Order 13490 (Jan. 21, 2009). In 2010, Obama-appointed Board Member Craig Becker refused to recuse himself from a dozen cases involving local chapters of the SEIU, for which he served as associate general counsel prior to his appointment to the Board. With Member Becker, however, Inspector General Berry found no ethical violation.

Two of the Trump-appointed Board Members came from law firms with over 1,000 lawyers, meaning the potential number of cases requiring recusal could be large.

The Board’s Recusal Standard: Where Does That Leave The Board?
The Inspector General’s broad application of President Trump’s Executive Order 13770 means that the Trump-appointed Board Members could be required to recuse themselves simply because their law firms worked on or participated in prior cases before the Board, even if the Member was not personally involved in the particular case. Two of the Trump-appointed Board Members came from law firms with over 1,000 lawyers, meaning the potential number of cases requiring recusal could be large.

Practically speaking, if just one of the three Trump-appointed Members recuses himself, then the Board is unlikely to obtain a majority decision.

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By Luther Wright, Jr.

The well-publicized sexual harassment allegations lodged against numerous public figures and senior leaders in corporate America have dominated the news cycle for the past 10 months. With sexual harassment now in the global spotlight as it has never been before, federal and state legislatures are beginning to make unprecedented legal changes aimed at curtailing harassment and making it more difficult to resolve harassment claims in a confidential fashion. However, these changes are not receiving the attention one might expect, which requires us all to pay close attention to the changing landscape.

On the federal level, #MeToo has impacted tax laws and brought an end to certain practices within the House and Senate. One of the more obscure provisions of The Tax Cuts and Jobs Act of 2017 (26 U.S.C. § 162) (the “Act”) includes major changes regarding the tax deductibility of settlements and attorney’s fees in harassment cases. § 162(q) of the Act reads as follows:

**DENIAL OF DEDUCTION FOR SETTLEMENTS SUBJECT TO NONDISCLOSURE AGREEMENTS PAID IN CONNECTION WITH SEXUAL HARASSMENT OR SEXUAL ABUSE.**—No deduction shall be allowed under this chapter for any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or attorney’s fees related to such a settlement or payment.

Inexplicably, §162(q) makes no distinction between plaintiffs and defendants and appears to apply with equal force to both. There is little guidance on the true purpose of this provision or how to interpret the meaning of the “related to” language in the statute. The impact of this provision will likely not be fully known until employers and individuals begin preparing tax returns at the end of the year, but it has already forced plaintiffs and defendants alike to reevaluate the fairly common practice of using non-disclosure provisions in settlements where sexual harassment has been alleged.

The Senate Anti-Harassment Training Resolution of 2017 (S. Res. 330) passed by a unanimous consent voice vote just two days after its introduction. The goal of the bill is to make certain that United States Senators are regularly receiving harassment training in the same fashion that most private companies provide training. Similarly, the Congressional Sexual Harassment Training Act (H.R. 4155) requires harassment training at least every two years. The Member and Employee Training and Oversight On (ME TOO) Congress Act (H.R. 4396 and S. 2159) (the “Act”) includes major changes regarding the tax deductibility of settlements and attorney’s fees in harassment cases. § 162(q) of the Act reads as follows:

**PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.**—No deduction shall be allowed under this chapter for any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or attorney’s fees related to such a settlement or payment.

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(1) requires annual training on harassment in both the Senate and House; (2) discontinues the legal practice of “mandatory mediation” in harassment matters; (3) gives interns and congressional fellows the same workplace protections on harassment as full-time staff. Additionally, Congress has passed legislation requiring legislators to repay the United States Treasury from personal funds for harassment claims settled by their offices and refer all settlements to an Ethics Committee for review for compliance with ethics rules. Congress’ goals appear to be to bring employment in Congress in line with most other employers and to increase the accountability of its members both personally and financially.

States are also responding to #MeToo in dramatic fashion. In 2014 only 8 states had no statute of limitations for sexual assaults. Just four years later, and after #MeToo and the allegations against Bill Cosby, 17 States have no statute of limitations and several have pending legislation aimed at ending the limitations period. Some States, like Colorado, have lengthened the statutory time period (Colorado increased the limitations period from 10 to 20 years) for sexual assault cases. Several other States have passed or have pending legislation ending confidentiality agreements and/or forced arbitration in sexual harassment or sexual abuse cases. Those states include Arizona, California, Illinois, New York, New Jersey, Pennsylvania and Tennessee.

The #MeToo movement is also leading to additional discussions about eliminating or extending the statute of limitations for harassment claims at the federal and state level and stiffening the financial and legal penalties for employers and harassers. Notably, the EEOC’s budget for FY 2018 has been increased by $15 million dollars (to an amount more than the EEOC requested) in large part because of the additional investigation demands expected due to #MeToo. Many commentators are expecting corresponding changes in the courts regarding the permissible scope of discovery, the relevancy of past harassment allegations and settlements, and the admissibility of testimony from alleged harassment or assault victims. It is expected that past allegations against alleged harassers, even if decades old, will become focal points in harassment litigation and that courts are more likely to allow plaintiffs much more latitude in discovery than in the past.

The legal landscape regarding sexual harassment has changed considerably in less than a year and does not appear to be slowing down any time soon. The pace and significance of changes in harassment matters requires us all to stay abreast of the newest developments and to advise our clients accordingly.

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**Luther Wright, Jr.** (luther.wright@ogletree.com) is Of Counsel at Ogletree, Deakins, Nash, Smoak & Stewart, P.C. in Nashville, Tennessee.
The Trauma-Informed Workplace

By Paul R. Klenck

One of the most profound public health studies of the last two decades is still little known. The Centers for Disease Control and Kaiser Permanente released a report in 1998 studying the long-term health effects of ten Adverse Childhood Experiences (ACEs): physical, sexual and emotional abuse; living with a family member who is addicted, depressed or mentally ill; experiencing parental divorce or separation; an incarcerated family member; and witnessing abuse to a mother. The study found that the higher a person’s ACE score—how many of the 10 factors that person experienced—the greater that person’s risk of chronic disease, mental illness, poor academic success, suicide and other consequences. Nearly 1 in 8 Americans have an ACE score of 4 or more, and 64% of adults have at least one. A person with an ACE score of 4 or more has double the risk of cancer and heart disease, a 700% greater chance of alcohol addiction, a 1200% higher likelihood of suicide, and a person with a score of 6 or greater is at risk of a 20-year shorter life expectancy. The CDC study has been replicated in a majority of states, and many cities and other countries.

Children with an ACE score of 4 or more have a 51% likelihood of having learning and behavior problems in school compared with a 3% likelihood of those with a 0 ACE score. Dr. Christopher Bloyett reported to the Washington State legislature in 2015 that “ACEs are a more consistent predictor of youth well-being than poverty.” Persistent stress, which often accompanies a person subject to multiple ACEs, results in changes to brain architecture resulting in dysregulated emotions and cognitive problems. However, research further shows that a single, caring adult can change toxic stress to manageable stress. Both children and adults can learn and implement resilience practices.

Adults with high ACE scores are more vulnerable to workplace risk. Nearly all employees are subject to some major stress events during their work life such as: work-related injury or illness, separation or divorce, severe depression, and chronic illness. When confronted with such major stress, less than 5% of workers who have an ACE score of 0 will have 15 or more days in a month interrupted by that stress, while over 15% of employees with 2 ACEs will, and the number soars to over 50% of employees who have an ACE score of 3 or higher.

Trauma-Informed Legal Practice

Attorneys representing children, abuse victims and trauma victims (which includes many criminal and civil defendants) are well-served by understanding the way they interview, communicate with and advocate will have a great effect on traumatized clients. Just with a health care provider to best represent your client.

Clients with high ACE scores or other trauma may be eligible for workplace accommodations if you can show impact on executive function or other major life activity. Some state laws provide accommodation requirements, such as Illinois’ Victims Economic Security and Safety Act.

Union Support of Member Trauma-Informed Practices

Attorneys must be alert for signs of trauma reactions and be sensitive in creating a safe environment for clients and witnesses.

Employees in many professions see the impact of trauma on the people they serve and on their own work environments. Two unions have responded to members’ expressed needs regarding trauma issues in the workplace.

The Illinois Education Association has partnered with local schools, medical providers and other stakeholders in educating communities about the effects of ACEs on students. When the state enacted student discipline reform measures in 2017, the IEA was able to help its members best implement the law by proving training on implementing trauma-informed restorative practices. Thousands of members have attended ACEs and trauma-informed practices trainings across the state. A compendium of IEA’s resources can be found at: www.ieanee.org.

The Minnesota Association of Professional Employees responded to members’ concerns about workplace bullying by advocating for changes in the workplace, negotiating contract protections and engaging with employers in implementing workplace policies to confront bullying. MAPE’s Anti-Bullying Toolkit can be found at: www.mape.org.

Paul R. Klenck (paul.klenck@ieanee.org) is Deputy General Counsel at the Illinois Education Association in Chicago.
Students across the country have launched a movement to combat gun violence and have inspired educators and others to protest for change. But what First Amendment protections do students and educators have when they engage in protests at their schools, such as wearing orange to protest gun violence or participating in student walkouts? To answer this, we look back to earlier student-led protest movements.

In December 1965, Mary Beth Tinker, then a 13-year-old junior high student, joined other students at her school in wearing a black armband to silently protest the Vietnam War. Mary Beth was instructed to remove her armband but she refused and was suspended. She sued the school district and the Supreme Court ultimately agreed that the school’s suspension of her violated the First Amendment. Students, the Court wrote, do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” and, as such, students can be disciplined for their school speech or expression only when the speech “substantially disrupt[s]” school activities. This standard still largely governs student speech rights cases. So just as Mary Beth’s silent armband protest was protected because it was not disruptive, the wear orange movement—where students wear orange apparel to protest gun violence—would likewise be protected.

But what about when students leave the schoolhouse grounds as a form of protest? The short answer is that schools can discipline students for participating in walkouts, because walking out of class “substantially disrupts” school activities. But First Amendment problems would arise if the school metes out punishment depending on the viewpoint being expressed. In Tinker, the Supreme Court found the challenged armband policy particularly problematic because the school prohibited black armbands to protest the Vietnam War, but permitted buttons with Nazi paraphernalia. So, for example, students walking out in favor of gun control could not be disciplined more harshly than their counterparts walking out to oppose gun control or to spend a day at an amusement park.

Yet a few weeks before the recent nationwide school walkout, a Texas school district announced that any student participating in a walkout protesting gun violence would automatically be suspended from school for three days even though other students who skipped class faced no such automatic suspension. Such a threat, particularly if carried out, raises serious First Amendment problems, as the ACLU of Texas pointed out to the district in a letter voicing objections to the threats.

Educators participating in student-led walkouts, however, have fewer protections. As public employees, educators’ speech rights in school are more limited than students’. In general, educators’ speech in school (giving a classroom lecture, for instance) will not be protected by the First Amendment, while educators’ speech outside of school (holding a sign at a weekend rally) will be. This in-school/out-of-school distinction matters doctrinally because most courts reason that educators’ speech is unprotected by the First Amendment when the educator speaks pursuant to official duties, but is protected when the educator speaks as a “citizen” about a “matter of public concern.” Thus, educators are unlikely to be protected by the First Amendment if they join their students in a walkout because educators’ participation during the school day would be employee speech, rather than citizen speech.

Although the First Amendment will not protect educators engaged in walkouts, other state, local, or collectively bargained protections may provide some protection. The National Education Association (NEA) has provided specific guidance to educators about their rights to engage in walkouts and other protests that they should consult.

The best course of action—and one that many school districts took—is for school administrators and educators to agree about educators’ roles before a walkout. Both NEA and the National School Boards Association (NSBA) endorsed this approach. NEA and NSBA also suggested that school districts consider planning the walkout themselves, which many school districts did. This approach ensured school order and students’ safety. Some schools went further: they recognized that students’ civic engagement and activism around gun violence presented a unique opportunity to teach about history, social science, media literacy, and law, and incorporated the protest movement into the curriculum.

More than 50 years after her own school protest, Mary Beth Tinker was at it again, this time rallying with students, educators, and supporters during the walkouts to, in her words, “shake U.S. gun violence to its core.” She is convinced that “[h]istory will applaud these brave young people.” While she recognized that students’ and educators’ First Amendment protections may be deficient, as she put it—quoting the late education law pioneer Isidore Starr—“like a turtle, we each have to stick our necks out to move forward.”

Mary Beth Tinker, 61, shows an old photograph of her with her brother John Tinker to the Associated Press during an interview in Washington.

AP PHOTO/MANUEL BALCE CENETA

By Eric A. Harrington and Amanda L. Shapiro
Cynthia E. Nance was among five honorees recognized and celebrated at the 28th Annual Margaret Brent Women Lawyers of Achievement Awards Luncheon during the ABA Annual Meeting in Chicago on August 5. The award was established in 1991 by the ABA Commission on Women in the Profession to honor outstanding women lawyers “who have achieved professional excellence within their area of specialty and have actively paved the way to success for other women lawyers.” Professor Nance is the embodiment of this accolade.

Nance, Dean Emeritus and Nathan G. Gordon Professor, has been an outstanding member of the University of Arkansas Law School faculty since 1994. In 2006, Nance became the law school’s first woman and the first African-American dean. She was appointed as the inaugural director of pro bono and community engagement of the law school. And, last December, the Vice Provost for Diversity and Inclusion of the University of Arkansas invited Nance to join the Diversity and Inclusion Core Team as the law school’s representative.

Dean Nance is a former member of the Section of Labor and Employment Law Council and currently serves as a Section Delegate to the ABA House of Delegates. Section Chair Don Slesnick commented that “we are proud and fortunate to have Cyndi as an active member of our Section. Her participation enriches the experience of all of our members, from law students to the most seasoned practitioners.” An elected member of ALI, The Labor Law Group, and the Board of Governors of The College of Labor and Employment Lawyers, Nance’s articles appear in journals including the Iowa Law Review, Berkeley Journal of Employment and Labor Law,

She is truly a trailblazer in demonstrating effective leadership as a university administrator while remaining fully engaged in social justice issues.

Rutgers Law Review, and Brandeis Law Review. She has been Scholar in Residence at University of Iowa College of Law and Washington University School of Law. She has given presentations on various legal and educational issues nationally as well as in Mexico, Brunei, and Singapore. Nance was invited by the State Department to speak in the Ukraine during Black History Month. During the Commonwealth of the Northern Marianas’ inaugural Martin Luther King Day Celebration, Nance served as keynote speaker. While at the Marianas Islands, she met with and spoke to groups of women about workplace law and domestic violence.

Well-known and highly respected within the ABA for both her professionalism and her personal warmth and kindness, Nance is sought after for her knowledge, perspective, insights, and determination. She currently serves as the Eighth Circuit member of the ABA Standing Committee on the Federal Judiciary, is a Section representative to the House of Delegates, and is a Council member of the ABA Section of Legal Education and Admission to the Bar. Recently, she accepted an invitation to serve as a member of the advisory board for the Center for Women in Law at The University of Texas School of Law’s Women Students of Color Research Study.

Throughout her career, Nance has served as a mentor and positive example to women. Letters collected in support of her nomination for the Margaret Brent Award reflect that she has influenced many other women to attend law school and pursue legal careers. Past students wrote to express the importance of Nance in their professional development and their personal lives.

Commenting on Nance’s receipt of the ABA’s Spirit of Excellence Award in 2012, her successor as dean of the University of Arkansas School of Law, Stacy Leeds, stated “women, and particularly minority women, law professors look to Cyndi Nance as one of the most inspirational leaders in academia. She is truly a trailblazer in demonstrating effective leadership as a university administrator while remaining fully engaged in social justice issues.”

Nance engages in a purposeful, on-going commitment to women, in the legal profession and in communities at large. She established the Dennis Shields Award scholarship at her alma mater, the University of Iowa College of Law and the path to success for others, and encourages others to reach back and do the same.

The ABA Margaret Brent Women Lawyers of Achievement Award is named for Margaret Brent, the first woman lawyer in America. In addition to Dean Nance, the 2018 honorees included: Patricia Kruse Gillette, Eileen M. Letts, Consuelo B. Marshall, and Tina M. Tchen.
New Supplement!


Editor-in-Chief: Ivelisse Berio LeBeau; Co-Chairs, Board of Senior Editors: Ivelisse Berio LeBeau, Jeffrey Lewis, Myron D. Rumeld (Fourth Edition), and Ian H. Morrison (Spring 2018 Supplement);

Employee Benefits Committee

This treatise offers detailed, annotated coverage of Employee Retirement Income Security Act (ERISA) Titles I and IV; rules of tax qualification, deductibility, and other key tax issues; preemption, with regard to ERISA and medical malpractice and related claims; benefit claims, with regard to evidentiary issues and abuse of discretion in denials; interplay with related legal areas; and effects of sexual orientation and veteran status on benefits.

Highlights of the Fourth Edition include: comprehensive review of laws affecting health plans, including the Affordable Care Act, HITECH security and breach notification regulations, and recent changes to MEWA requirements; updated discussion of litigation on church plans; analysis of the Multiemployer Pension Reform Act of 2014 and how it affects multiemployer defined benefit plans; review of case law developments after the Supreme Court’s decision in Fifth Third Bancorp v. Dudenhoeffer; and more.

The Spring 2018 Supplement updates the treatise with coverage current through December 31, 2016, as well as Supreme Court opinions, final regulations, and legislation issued through August 31, 2017.

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By Brian M. Malsberger; Board of Review Associate Editors: David J. Carr, Arnold H. Pedowitz, and Eric Akira Tate; Committee on Employment Rights and Responsibilities

This three-volume treatise delivers the information practitioners need to analyze, draft, and litigate covenants not to compete. Comprehensive yet easy to use, Covenants Not to Compete uses a uniform topic structure that provides a comparative view across states, making it invaluable for lawyers with a multi-jurisdictional practice and for those seeking persuasive authority from other states.


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Title IX
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In 1987, Title IX was amended by the Civil Rights Restoration Act, which provided a clear definition of education program or activity as “all of the operations” of certain kinds of entities, “any part of which” receives federal funding. The amendment made evident that such entities included not only colleges and universities, but also entire organizations that receive federal assistance as a whole or that are principally engaged in the business of providing education, health care, housing, social services, or parks and recreation, as well as joint ventures between such entities.

Courts are currently split on the issue of whether a medical resident has the right to file a private cause of action under Title IX in the context of employment discrimination and harassment claims. Some courts have concluded that Title VII provides the exclusive remedy for individuals alleging employment discrimination and harassing statements in federally founded educational institutions. The growing circuit split regarding whether Title VII preempts concurrent claims raised under Title IX was reaffirmed by Sara Slabisak v. Univ. of Tex. Health Sci.Ctr. at Tyler; et al., No. 4:17-CV-00597, 2018 WL 1072511, at *3 (E.D. Tex. Feb. 27, 2018). In that case, Judge Amos Mazzant dismissed a former medical resident’s Title IX claims of sexual harassment and retaliation against the University of Texas Health Science Center at Tyler (UTHSC) on the grounds that Title VII is the exclusive remedy for claims of employment discrimination on the basis of sex in federally funded educational institutions. In doing so, Judge Mazzant re-affirmed Fifth Circuit precedent, noting that “the basis for Plaintiff’s Title IX claims—deliberate indifference and retaliation—revolve around the allegations that Plaintiff was subjected to a hostile work environment, which UTHSC failed to address and correct; and moreover, that UTHSC retaliated against Plaintiff when she informed them of said hostile work environment. Such claims fall within the exclusivity of Title VII—employment discrimination on the basis of sex in a federally funded educational institutions.” Id. at *3; see also id. at *2 (citing Lakoski v. James, 66 F.3d 751, 755 (5th Cir. 1995) (“Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.”). Slabisak is also consistent with the Seventh Circuit’s decision in Waid v. Merrill Area Pub. Sch. 91 F.3d 857, 861-62 (7th Cir. 1996), abrogated by Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 129 S. Ct. 788 (2009) (holding that Title VII preempts Title IX).

On the other hand, courts including most recently the Third Circuit in 2017, have determined that a medical resident can be considered both an employee of a hospital for purposes of Title VII and a student for purposes of Title IX, and thus, can permissibly assert claims under both statute. By permitting a medical resident to assert a private right of action of sex discrimination under Title IX, the Third Circuit has aligned itself with the First and Fourth Circuits, which all have permitted Title IX sex discrimination claims to be brought against federally funded educational programs concurrent with Title VII claims. See Doe v. Mercy Catholic Medical Center, 850 F.3d at 563–64 (3rd Cir. 2017); see also See Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988), aff’d, 759 F. Supp. 40 (D.P.R. 1991); Preston v. Com. of Va. ex rel. New River Cnty. Coll., 31 F.3d 203, 207 (4th Cir. 1994) (discussing discrimination claims where Title VII does not preempt Title IX because the claims are independent). However, prior to the Third Circuit’s decision in Doe v. Mercy Catholic Medical Center, never before had a federal appeals court concluded that Title IX sex discrimination claims can be brought by those in medical residency programs.

The First, Third and Fourth Circuit’s positions are all significant because based on this precedent not only can a plaintiff potentially prevail under both Title VII and Title IX, but a plaintiff can bring suit alleging discrimination and harassment under Title IX without first exhausting his or her administrative remedies by filing a Charge of Discrimination with the Equal Employment Opportunity Commission. And, while the Third Circuit in Doe did not reach the question of whether Mercy was subject to Title IX as a recipient of federal financial assistance through its acceptance of Medicare payments, clearly the decision’s implications raise concerns among teaching hospitals whether a Title IX violation could lead to a loss of essential federal funding. These cases illustrate the need for hospitals and health care institutions providing teaching and training programs, especially those affiliated with an educational institution, to ensure they are compliant with both Title VII and Title IX.

Courtney Barksdale Perez (cperez@carterarnett.com) is a Partner in the Dallas, Texas office of Carter Arnett PLLC.

The Section is pleased to be sponsoring our Annual Law Student Trial Competition in this fall in Chicago, Dallas, Los Angeles, Miami, New York and Washington, DC. We need your help to make it possible. Please e-mail us at laborempilaw@americanbar.org if you are available to help judge the competition in your city. Volunteering requires a five-hour time commitment.

Visit ambar.org/littrialad for specific dates and locations.
LGBT continued from page 3

Will the Supreme Court weigh in?
Due to these conflicting outcomes, the issue of whether Title VII prohibits discrimination based on sexual orientation and transgender status is ripe for the Supreme Court to decide. While the Supreme Court denied the plaintiff’s petition for a writ of certiorari filed in the Evans case, this denial occurred before decisions by the Second and Sixth Circuits. Until the Supreme Court resolves this split in authority, it is critical for practitioners and employers alike to take notice of the various local, state, and now federal laws, which offer protections to LGBT+ individuals to ensure compliance.

Amber M. Rogers (arogers@huntonAK.com) is a Partner at Hunton Andrews Kurth LLP in Dallas, Texas. Jennifer N. Jones (jennifer.n.jones@toyota.com) is Managing Counsel at Toyota Motor North America, Inc. in Plano, Texas.

Hy-Brand continued from page 4

three-member majority, which is significant because Republican-appointed Members now constitute a 3-2 majority for the first time since 2007. As Hy-Brand has demonstrated, the Board has recently begun revisiting Obama-era cases and otherwise issuing new decisions. Parties are attempting to use the recusal standard both to prevent revisions to the Board’s jurisprudence and to overturn decisions that it perceives to be unfavorable.

For instance, a challenge was recently lodged against Member Emanuel in Boeing Company, 365 NLRB No. 154 (2017), which overturned Lutheran Heritage Village-Livonia, 343 NLRB No. 646 (2004), a case relating to employer work rules. Following the Board’s decision in the Boeing Company, International Union of Painters and Allied Trades filed a motion requesting the Board to vacate its decision. Its basis for doing so? Member Emanuel allegedly should have recused himself because his former law firm previously represented Boeing in unrelated matters. While the Board has yet to decide whether to vacate, the use of the recusal standard to challenge Boeing Company highlights the uncertainty that will likely continue in the future.

Finally, the recusal standard, if applied prospectively to undecided cases could also have substantial implications. The Board is set to hear a wide variety cases that could shape federal labor law for the years to come. The docket includes Velox Express, Inc., in which the Board will consider whether misclassification of employees as independent contractors violates the National Labor Relations Act. The docket also includes Newmark Grubb Knight Frank, a case challenging the Board’s 2014 ruling in Purple Communications, Inc., in which the Board held that employees have the right to use their employer’s email system for union organizing purposes.

Conclusion: Time Will Tell
As presently applied, the recusal standard has potentially far-reaching consequences for Trump-appointed Board Members, particularly Members Emanuel and Ring, who came from large law firms. In the short term, some Board decisions will inevitably be challenged based on the recusal standard contained in Executive Order 13770. If successful, the Board may fail to obtain a majority vote, which could create uncertainty as to applicable Board law. Alternatively, the Board Member could simply refuse to recuse himself, or a new Inspector General could reinterpret the recusal standard.

In any case, the uncertainty will not be permanent. The Executive Order only applies to the appointee’s first two years of service and hypothetically could be abolished altogether at any time if President Trump withdraws or modifies the Executive Order. Nevertheless, labor lawyers, employers, and others are well-advised to follow forthcoming developments carefully.

Gary Enis (genis@HuntonAK.com) is an Associate in the Dallas, Texas office of Hunton Andrews Kurth LLP. Sara Hamilton (shamilton@HuntonAK.com) is an Associate in the firm’s Atlanta, Georgia office.
Calendar of Events

2018

October 27 – 28
Law Student Trial Competition
Dallas, Texas
Miami, Florida

November 3 – 4
Law Student Trial Competition
Chicago, Illinois
Washington, DC

November 7–10
12th Annual Section Conference
Hilton San Francisco Union Square
San Francisco, California

November 17–18
Law Student Trial Competition
Los Angeles, California
New York, New York

2019

January 23 – 29
ABA Midyear Meeting
Caesars Palace
Las Vegas, Nevada

MIDWINTER MEETINGS

January 24 – 26
State & Local Government
Bargaining & Employment Law
Committee Midwinter Meeting
Grand Hyatt Playa del Carmen
Playa del Carmen, Mexico

February 6 – 9
Employee Benefits Committee
Midwinter Meeting
Loews Vanderbilt Hotel
Nashville, Tennessee

February 15 – 17
ADR in Labor & Employment
Law Committee
Hotel Del Coronado
Coronado, California

February 20 – 22
Federal Labor Standards
Legislation Committee
Grand Hyatt Playa del Carmen
Playa del Carmen, Mexico

February 24 – 27
Committee on Development of
the Law Under the NLRA
Fairmont Miramar
Santa Monica, California

February 26 – March 1
Committee on Practice &
Procedure Under the NLRA
Fairmont Miramar
Santa Monica, California

March 14 – 16
Workers’ Compensation
Committee
The Biltmore Hotel
Coral Gables, Florida

March 19 – 23
Employment Rights &
Responsibilities
Four Seasons Las Vegas
Las Vegas, Nevada

March 21 – 22
Ethics & Professional
Responsibility Committee
Four Seasons Las Vegas
Las Vegas, Nevada

April 3 – 6
National Conference on Equal
Employment Opportunity Law
Presented by the EEO Committee
The Biltmore Hotel
Coral Gables, Florida

May 5 – 9
International Labor and
Employment Law Committee
Park Hyatt
Buenos Aires, Argentina

For more event information,
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