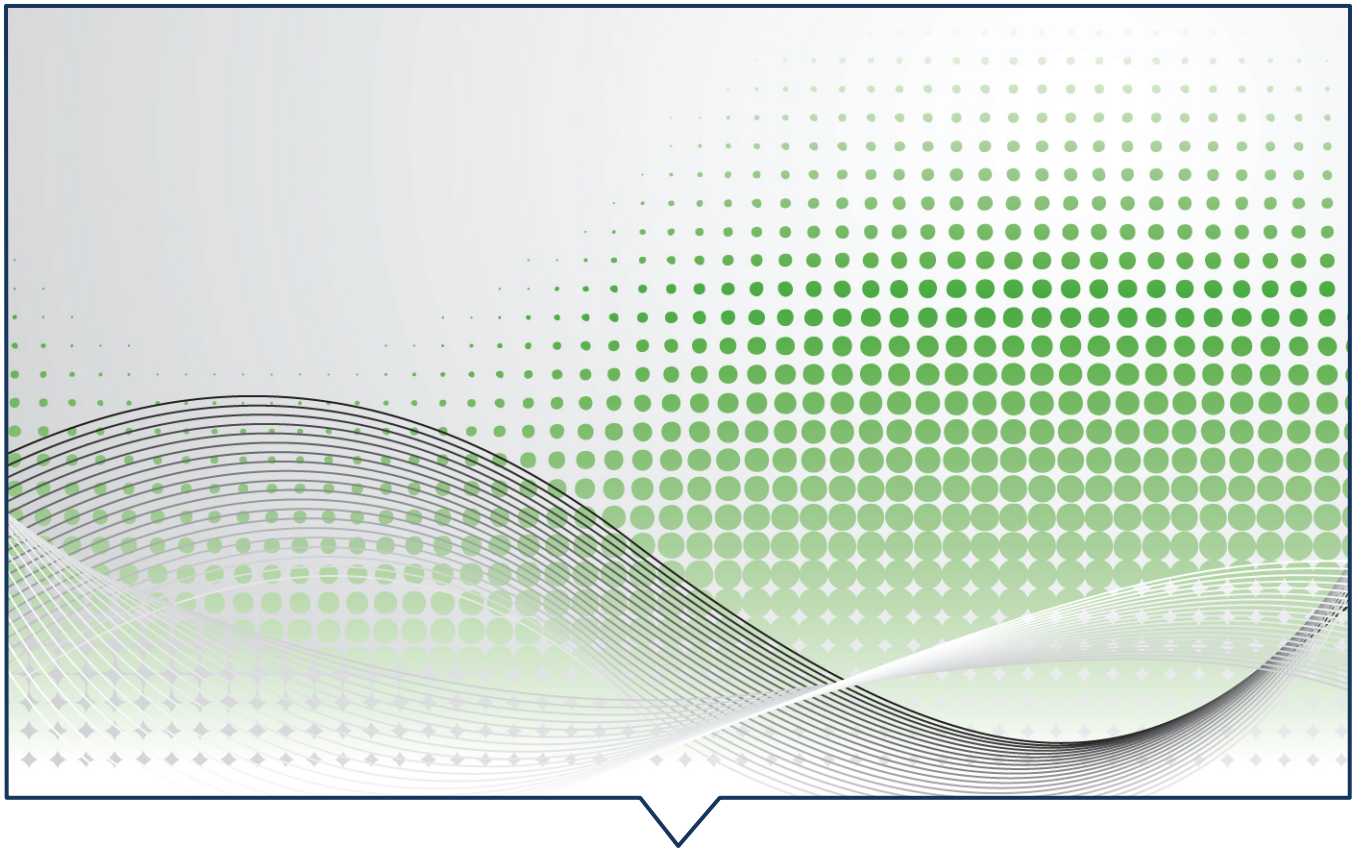

The Hospitality Law Conference

Lessons Learned in Human Resources from Pop Culture's 2015 Memorable Moments

Sylvia Bokyung St. Clair ▼ February 22-24, 2016

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Sylvia St. Clair is a member of the firm's labor and employment group. She focuses her practice on employment litigation, counseling clients regarding proper employment practices and risk management.

Sylvia has represented employers in employment discrimination complaints in federal court, before the Equal Employment Opportunity Commission and numerous state equivalents. From small business owners to large companies, Sylvia defends employers in wrongful termination and discrimination matters involving gender, race, national origin and age discrimination.

Sylvia has prepared employment documents for clients, including policies and procedures, contracts, non-compete agreements, settlement and confidentiality agreements. Additionally, she works closely with employers to ensure their employment manuals are comprehensive and compliant with current state and federal laws.

In addition to labor and employment, Sylvia's experience includes commercial, product liability, toxic tort and transportation matters. She defends manufacturers, suppliers, service providers and employers against allegations of personal injury, catastrophic loss and other types of exposure claims. Sylvia served as National Coordinating Counsel and Local Counsel in defending product liability and toxic tort claims.

Before Faegre Baker Daniels, Sylvia was a litigation attorney at Segal McCambridge Singer & Mahoney, Ltd. where she practiced commercial, employment, product liability, toxic tort and transportation law.

Prior to her legal profession, Sylvia enjoyed a decade-long career in hospitality management, holding various positions with hotels, restaurants and a racetrack.

Pro Bono

- U.S. District Court, Northern District of Illinois — Settlement Assistance Program

Honors

- Chicago-Kent College of Law — Bar & Gavel Society (top graduates distinguishing themselves through commitment to the law school and legal community), 2013; Moot Court Honor Society; Charles Evans Hughes Moot Court Competition, 2011 Finalist; Ilana Diamond Rovner Moot Court Competition, 2012 Octofinalist; Cultural Heritage Moot Court Competition, 2013 Semifinalist
- Women's Bar Foundation Scholarship (one female student at each Illinois law school demonstrating academic achievement and commitment to diversity), 2012
- Kumiko Watanuki Scholarship for Women, 2010

Professional Organizations

- Women's Bar Foundation — Co-Chair, 2015-present
- Chicago Bar Association

Civic Activities

- Women in Law Mentorship Program, 2014-present

Compensation & Federal Employer Liability Act

Education

Chicago-Kent College of Law
J.D., cum laude, *Chicago-Kent Law Review* (executive articles editor) (2013)

DePaul University
B.A. in Legal Studies

Bar Admissions

Illinois

Court Admissions

U.S. District Court for the Northern District of Illinois

U.S. District Court for the Southern District of Illinois

Published Articles

- **If You Catch an Employee Sleeping on the Job, It May Expose You to Liability**
  Contributor, *The Logistics Journal*, Transportation Intermediaries Association, November 2013
- **Don't Get Caught Spoiling: What Every Litigant Needs to Know If You Think You Might Be Sued**
  Contributor, *The Logistics Journal*, Transportation Intermediaries Association, January 2013

Personal Interests

Sylvia competed in her first Olympic distance triathlon in 2014. She also enjoys gardening and cooking. She occasionally assists at her family's Japanese restaurant in Chicago's southwest suburbs.

I. SCOPE OF ARTICLE

2015 was an exciting year in pop culture: A former Olympic decathlon champion documents her gender transition on national reality television. A county clerk in Kentucky gains international attention after defying a federal court order requiring that she issue marriage licenses to same-sex couples. A leading female actress shares an open letter on social media raising questions about gender wage disparity. At the heart of these widely publicized moments are takeaway lessons for hospitality employers. This session covers issues involving transgender discrimination, religious accommodations, the Equal Pay Act and other "hot button" employment issues.

II. TRANSGENDER ISSUES IN THE WORKPLACE

In 2015, Caitlyn Jenner, formerly Bruce Jenner, publically announced her transition to a transgender woman in a *Vanity Fair* cover story. The impact of Caitlyn's story was profound. Within hours, Caitlyn had over one million Twitter followers. Also in 2015, Jazz Jennings, a 15-year old transgender supermodel, launched her reality series called *I am Jazz*, documenting her life as a transgender teenager. Jazz Jennings was voted as one of the 25 most influential teens of 2014 alongside Sasha Obama. According to a 2011 report issued by the Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law, an estimated .3% of adults identify as transgender or approximately 700,000 people in the United States. Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual and Transgender*? THE WILLIAMS INSTITUTE (April 2011), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. In 2013, Public Religion Research Institute reported that roughly 1-10 (9%) of Americans reported a close friend or family member who is transgender. While employers have worked through these issues for some time, public attention to transgender issues has caused them to become more prevalent in the workplace. PUBLIC RELIGION, http://publicreligion.org/research/2015/06/survey-majority-favor-same-sex-marriage-two-thirds-believe-supreme-court-will-rule-to-legalize/#.VsIypvkrLIU (last visited February 11, 2016).

Eighteen states and the District of Columbia have passed state-wide employment non-discrimination laws covering gender identity as of 2015. *Non-Discrimination Laws: State by State Information – Map*, ACLU, https://www.aclu.org/map/non-discrimination-laws-state-state-information-map (last visited February 11, 2016). New York, New Hampshire, and Wisconsin passed state-wide employment non-discrimination laws that covers only sexual orientation *not* gender identity. At least 31 states have unclear non-discrimination protections. In 2015, a federal LGBT non-discrimination bill called the Equality Act was introduced to Congress that would establish permanent protections against discrimination based on an individual's sexual orientation or gender identity in matters of employment, housing, access to public places, federal funding, credit, education and jury service.

Today, while there is no federal law that prohibits discrimination in employment on the basis of gender identity, the EEOC has made gender identity protections a top priority. In mid-2012, the EEOC issued an opinion in *Macy v. Holder* that declared discrimination against transgender employees is discrimination "based on sex" that is prohibited by Title VII of the Civil Rights Act of 1964. Appeal No. 0120120820, 2012 WL 1435995 (April 20, 2012). In late 2012, the EEOC issued a "Strategic Enforcement Plan" that noted a "top Commission enforcement priority" is the coverage of lesbian, gay, and transgender ("LGBT") individuals under Title VII's sex discrimination prohibition.

The EEOC filed the first ever lawsuits challenging transgender discrimination under Title VII in 2014. The first lawsuit settled for $150,000 and an agreement that the defendant would implement a new gender discrimination policy. *Lakeland Eye Clinic will Pay $150,000 to Resolve Transgender/Sex Discrimination Lawsuit*, available at http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm; 2014 WL 478414 (M.D. Fla. Sep. 25, 2014). In *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., the Eastern District of Michigan court rejected the EEOC's two discrimination theories that the employer acted (i) because the employee was a transgender; and (ii) because the employee was transitioning from a male to a female. 100 F.Supp.3d 594, 602 (E.D. Mich. 2015). In denying the defendant's motion to dismiss, the court acknowledged that "[e]ven though transgender/transsexual status is currently not a protected class under Title VII, Title VII nevertheless 'protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender." Therefore, the court concluded that the EEOC sufficiently plead that the employee's failure to conform to the defendant's "sex- or gender-based preferences, expectations, or stereotypes was the driving force behind the defendant's decision to fire him." As of January 2016, this case is still pending.

The EEOC filed its third lawsuit in the U.S. District Court of Minnesota, *EEOC v. Deluxe Financial Services Corp*. No. 15-cv-02646 (D. Minn. 2015)(PACER). Charging Party claimed she was subjected to discrimination and a hostile work environment after she informed her supervisors she was transgender. Her employer refused her from using the women's restroom and co-workers used hurtful epithets and intentionally used the wrong gender pronouns to refer to her. This matter settled for $150,000.

Employers can best prevent discrimination complaints by fostering a workplace that respects every individual and discourages any type of employment discrimination:

- **Dress and appearance**. Employers are encouraged to review their policies on dress and appearance and consider eliminating dress specific and appearances rules.

- **Privacy and confidential**. An employee's transition should be treated with sensitivity and confidentiality. The EEOC has interpreted the Americans with Disabilities Act to limit the medical inquires an employer may make of its employees and require employers to keep such information confidential subject to narrow exceptions.

- **Workplace assignments and duties**. Consider eliminating gender specific assignments. Once an employee works full-time in the gender that reflects his or her gender identity, consider treating the employee as that gender for purposes of all assignments and duties.

- **Sanitary access for workers**: The Occupational Safety and Health Administration ("OSHA") requires that all employers under its jurisdiction provide employees with sanitary and available toilet facilities. (1910.141). Employers may not impose unreasonable restrictions on employee use of toilet facilities. Employers should implement written policies to ensure that all employees, including transgender employees, have prompt access to appropriate sanitary facilities:

    a) The employee should determine the most appropriate and safest option for him or herself. For example, a person who identifies as a man should be permitted to use men's restrooms. A person who identifies as a woman should be permitted to use women's restrooms.

b) Single-occupancy gender –neutral (unisex) facilities; and

c) Use of multiple-occupant, gender-neutral restroom facilities with lockable single occupant stalls.

Under these practices, employees are not asked to provide any documents of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status. *Lusardi v. McHugh*, Appeal No. 0120133395 (2013)(Employers should stay away from offering a "single shot" restroom that is isolated and "segregates" employees as it may deprive or tend to deprive employees of equal employment opportunities).

III. RELIGIOUS ACCOMMODATIONS – WHEN DOES YOUR RELIGION LEGALLY EXCUSE YOU FROM DOING A PART OF YOUR JOB

Kim Davis, a Kentucky county clerk, refused to issue a marriage license to same-sex couples. Also last year, the EEOC was awarded $240,000 on behalf of two truck drivers who claimed they were wrongfully discharged for refusing to make beer deliveries. A flight attendant has recently filed a complaint with the EEOC alleging she was placed on administrative leave after refusing to serve alcohol for religious reasons. The charge is still pending at the EEOC.

Accommodation of employee religious beliefs has been an obligation for years under Title VII. Historically, most employees request for religious accommodation involving changes to their schedules or dress codes. Now employees are asserting the right not to perform certain duties over their religious beliefs (*e.g.*, the Kim Davis effect).

Can religion excuse an employee from performing all or some of the following tasks:

- Server or room service attendant refusing to serve or deliver alcohol;
- Housekeeper requesting Saturdays off;
- Front desk agent refusing to issue a room key to a same-sex couple; or
- Employee refusing to take off a headscarf pursuant to her religious obligations that conflict with the employer's dress policy.

According to Title VII, an employer has an obligation to provide a reasonable accommodation to an employee who has a **sincerely held religious belief**. To satisfy its burden, the employer must demonstrate *either* (1) that it provided the employee with a reasonable accommodation for his or her religious observances *or* (2) that such accommodation was not provided because it would have caused an undue hardship—that is, it would have "resulted in 'more than a *de minimis* cost' to the employer." *EEOC v. Firestone Fibers & Textiles Co*., 515 F.3d 307, 312 (4th Cir. 2008). Reasonable accommodations need not be the employee's preferred accommodations. Rather, so long as the employer has offered a reasonable accommodation, is has fulfilled its duty under Title VII. *Id.* at 312.

(1) Religious belief must be sincerely held. Look for suspicious timing with secular requests – is it merely a personal preference or one of deep religious conviction?

- **Take Friday's off**: An employee's right to observe her Sabbath is a protected religious practice, but her demand that she take additional time off on Friday afternoons to prepare for Sabbath preparation may be a personal preference. *Dachman v. Shalala*, 9 Fed. Appx. 186, 191-93 (4th Cir. 2003).

- **Longer breaks**: An employee's preference to perform congregational prayers at his home mosque rather than one closer to his employer's place of business was a preference and not protected by Title VII. *Hussin v. Hotel Employees & Rest. Union, Local No. 6*, No. 98-cv-9017, 2002 WL 10441, at *4 (S.D.N.Y. Jan. 3, 2002).

(2) Religious belief is broadly defined and can include individual beliefs unique to the individual;

- Refusal to give a blood sample was not a mainstream religious belief or common interpretation of the Bible, but his belief was based on his connection with God, nor purely on secular philosophical concerns. *U.S. v. Zimmerman*, 514 F.3d 851, 853-4 (9th Cir. 2007).

(3) Religious dress or grooming requests can only be denied due to safety, security or health concerns in the workplace;

(4) Making a good faith effort to accommodate or showing undue burden are still defenses to such claims; and

(5) An employer need not provide employee's preferred accommodation if an equally effective alternative is offered.

IV. PAY EQUALITY – A GROWING ISSUE FOR HOSPITALITY EMPLOYERS

In 2015, Jennifer Lawrence, known for her roles in *Hunger Games* and *Joy* (where she won a Golden Globe for Best Performance by an Actress), shared an open letter on Facebook raising questions about gender wage disparity after a computer hack revealed she was paid less than her male counterparts in *American Hustler*. Also, in 2015, after the release of *Star Wars, the Force Awakens*, reports circulated that Harrison Ford, who had a supporting role in the movie, was paid 50 times more than his younger "leading" co-stars Daisy Ridley (Rey) and John Boyega (Finn). Disney explained that the pay disparity was due to Ridley and Boyega's lack of on-screen experience despite their "leading" roles and Ford had a lengthy history with Star Wars and was paid according to Disney's "legacy pay" scale that pays actors considerable increases which coincides with their involvement in a franchise.

The right of employees to be free from discrimination in their compensation continues to make headlines, and with the recent passage of California's New Fair Pay Act, which went into effect on January 1, 2016, hospitality employers should anticipate hearing more about this issue in the coming year. The Equal Pay Act prohibits employers from discriminating against employees on the basis of sex by paying higher wages to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. 29 U.S.C.A. § 206(d)(1). An employee who believes he or she is paid differently than members of the opposite sex for a position that requires equal levels of skill, efforts, and responsibility may file a claim under the EPA or Title VII.

California's new pay act is one of the strictest and most aggressive equal pay laws in the country. The new standard permits an employee to bring an unequal pay claim based on employee wage rates in *any* of their employer's facilities and in other job categories as long as the work is substantially similar. A female housekeeper who cleans rooms may challenge the higher wages of a male janitor who cleans the lobby and banquet halls. That same housekeeper may now challenge the higher wages of male janitors at *different* tiered or flagged hotels so long as the work is "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."

Practical takeaways:

- The employer's defense to a claim is that the entire wage is based on the reasonable application of the following: (i) seniority system; (ii) merit system; (iii) systems which measures earnings by quantity or quality of production; (iv) bona fide factor other than sex, such as education, training, or experience. This is a similar standard applied by the EEOC when evaluating EPA claims.

- Conduct a wage audit/review of employee pay equity and identify any opposite sex pay practices for "substantially similar" work;

- Review all pay and compensation-related policies and procedures, including job descriptions, employee handbooks, review and evaluation protocols; and

- Provide internal training to members of management who make decisions regarding employees' pay and compensation.

V. HIRING BARRIERS AND BACKGROUND CHECKS – DISCRIMINATION AND BIAS BASED ON PAST ARREST AND CONVICTION RECORDS

News stories involving Jared Fogle and Bill Cosby were heavily followed by social media in 2015. Fogle was sentenced to 15 years and 8 months; Cosby was recently arrested and charged with a criminal offense. Under the "ban the box" policies and other hiring barriers implemented by some states, an employer is prohibited from asking an applicant about their prior arrests or their criminal history. Nationwide, over 100 cities and counties have adopted "ban the box" policies. "Ban the box" policies prohibit employers from asking candidates about their criminal history until *after* the candidate has been determined qualified for the position and notified that he or she has been selected for an interview or after the employer has made a conditional offer of employment. According to the National Employment Law Project ("NELP"), 19 states, Washington D.C., and over 100 cities and countries have adopted fair hiring policies. Seven states have removed the conviction history question on job applications for private employers: Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island. Michelle Natividad Rodriguez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NELP, http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ (last accessed February 11, 2016). According to NELP, 65 million adults will be affected by such barriers to employment based on criminal records.

In 2012, the EEOC updated its Enforcement Guidance on the Consideration of Arrest and Conviction Record in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, U.S.C. § 2000e *et seq*. President Obama's administration has initiated recommendations to "eliminate

unnecessary barriers" including the elimination of forms of discrimination and bias based on past arrest and conviction records. *My Brother's Keeper Task Force Report to the President* 53 (May 2014). This movement to limit hiring barriers does not stop with criminal background inquiries. Employers may also be limited or restricted in reviewing or considering a job applicant's consumer's credit history.

Practical takeaways:

- Determine which laws apply to your company: consult state, local law, and EEOC guidelines;
- Revise and reprint job applications and consider removing the question and inquiring into history at a later point in the hiring process;
- Update the company's policies; and
- Train hiring managers.