

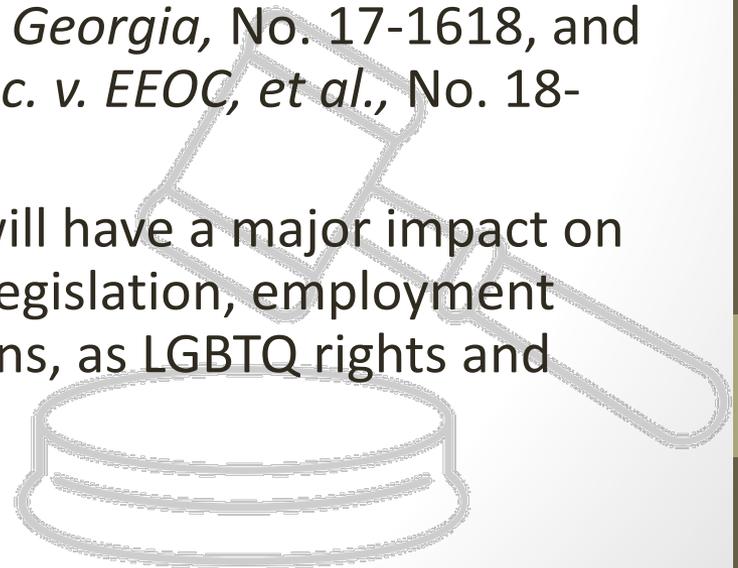
# Moving Past HR 101 -Current Issues in HR

Cary Erickson, SPHR, SHRM-SCP

# U.S. Supreme Court to Rule on LGBTQ Workplace Protections under Title VII

The Court has agreed to hear three cases to determine:

- Whether Title VII's ban on "sex"-based discrimination prohibits discrimination based on sexual orientation; and
- Whether Title VII prohibits discrimination against transgender claimants based on their status as transgender or based on sex stereotyping.
- These cases will be heard as *Altitude Express Inc. v. Zarda*, No. 17-1623, *Bostock v. Clayton County, Georgia*, No. 17-1618, and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC, et al.*, No. 18-107.
- The outcome of these cases likely will have a major impact on numerous cases, federal and state legislation, employment decisions, and even political elections, as LGBTQ rights and protections continue to evolve.



# CBD Oil remains Illegal in Texas

- With the passage of the 2018 Farm Bill, Congress legalized much, but not all, hemp products containing less than .3 percent THC concentration.
- Cannabidiol, or CBD oil, is a hemp product that is touted as having many positive medical and health benefits. CBD oil may or may not contain THC.
- The media reports surrounding the legalization in the Farm Bill and intense marketing efforts of CBD oil distributors has caused some Texas employees to believe that CBD oil and other hemp products are now legal in Texas.
- Except for CBD oil having a THC concentration of less than .5 percent prescribed for very specific diagnoses by a physician licensed and registered to prescribe the oil (and confirmed by a second physician), **possession, use or sale of the CBD oil is a felony under state law.**
- Marijuana is still illegal under federal and state law.
- There are no employment protections for workers who use marijuana recreationally even in states that have legalized such use.
- Employers are never required to tolerate on the job impairment.

# Social Media Monitoring

- Employees have a legitimate and reasonable expectation of “limited” privacy in most cases.
  - So long as they take steps to protect their media accounts from public viewing, courts have been willing to uphold this privacy expectation. Thus, employers that monitor employees’ social media accounts could run the risk of breaching the privacy expectation.
- “Friending” your subordinates on social networking sites, such as Facebook, is risky.
  - It opens you up to a whole wealth of information you’d probably rather not have access to
  - It also blurs the line you must keep firm in the employer/employee relationship.
  - You may find out an employee has religious preferences, medical issues, political views, or social affiliations you didn’t know about.

# Social Media Monitoring cont'd.

- If you learn the information via social media and then later pass them over for a promotion, give them an unflattering performance appraisal, or do anything they may perceive as unfair treatment, you run the risk of a harassment or discrimination claim.
- Searching social media about potential employees may bring you the same risks
  - If you search social media, you must be consistent
- Whether you can discipline an employee based on information you learned on social media depends on what you discover and how you discovered it.



# Social Media Monitoring cont'd.

- If you learned it because you legitimately had access to her site, then you may be able to use it (provided it is not some sort of “protected speech”).
  - Legitimate access could include their site being open for public viewing, your being “friends” with them on Facebook (and therefore she would have no privacy expectation with respect to your viewing her site), or another employee with access to their site bringing the information to your attention.
  - What you cannot do is ask an employee who is friends with them on Facebook to check the posts and then report back to you.

**Bottom line – if you discover something for which you would take action if it was said or done in a Face-to-Face interaction, treat the situations the same.**



# BAN the BOX



*Have you  
ever been  
convicted?*

- Thirty-two states and more than 150 cities and counties have adopted laws/policies that prohibit employers from asking job candidates about their criminal histories until the latest stages of the hiring process
- In 2016, Austin passed the “Fair Chance Hiring Ordinance” preventing private employers with 15 or more employees from asking potential job candidates’ criminal history before extending a conditional job offer.
- The Texas Senate had preliminarily approved a bill in a package of legislation aimed at limiting the ability of cities to regulate private companies’ employment policies.
- The bill would have preempted local rules that disallow employers from asking about an applicant’s criminal history during the earliest stages of the application process.
- While it did not pass, it is certainly something that all employers in Texas should stay aware of.

# First Amendment Audits

- Auditors typically travel to a place that is considered public property, such as a sidewalk or public easement, or a place open to the public such as a government building, and visibly and openly photograph and record buildings and persons in their view.
- Auditors purportedly believe that the movement promotes transparency and open government.
- Audits are often confrontational in nature as Auditors have also been known to enter public buildings while open carrying, leading to accusations that Auditors are engaged in intimidation, terrorism, and the sovereign citizen movements.
- One auditor stated goal of an audit is to "put yourself in places where you know chances are the cops are going to be called. Are they going to uphold the constitution, uphold the law . . . or break the law?"

# First Amendment Audits cont'd.

- Auditors state that they seek to educate the public that photography is not a crime, while publicizing cases where officers illegally stop what is perceived as illegal conduct.
- The rights exercised in a typical audit comes from the First Amendment, Fourth Amendment, and Fifth Amendment of the United States Constitution. Specifically, *Freedom of Speech* and *Freedom of the Press* under the First Amendment, and *Freedom from Unreasonable Searches and Seizures* under the Fourth Amendment, and the *Right to Remain Silent* under the Fifth Amendment.
- The act of recording in public is a constitutional right. As long as the auditor remains in a public place where they are legally allowed to be they have the right to record anything in plain view, subject to very limited time, place, and manner restrictions.
- Develop policy and train employees.

# Suggested County Guide for Visitors and Camera Use At County Facilities

Except for staff work areas and other private areas, the public is allowed to enter County facilities and allowed to take video/photos unrestricted. However, people visiting the premises and/or photographing cannot prevent employees from continuing to work or impede public access to County facilities.

## Examples of allowed public spaces

- Customer services areas/entry ways
- Publicly accessible halls/corridors
- Publicly accessible streets/sidewalks/parks/plazas

## Examples of prohibited public spaces

- Staff work areas located behind closed doors or staff only areas.
  - Offices/meeting rooms/staff halls/staff corridors/any other location which is restricted to employees only.
- Areas restricted by membership or tickets.
  - Non-Publicly accessible areas at recreation facilities
  - Non-Publicly accessible areas at performance venues

# Suggested County Guide for Visitors and Camera Use At County Facilities cont'd.

## Camera Use is also prohibited in Public or Private Restrooms or Dressing Rooms

What to do if approached by individual entering the premises and/or taking photo/video:

- Be professional and polite.
- Acknowledge and provide normal assistance but do not engage/argue.
- Concentrate on job function/duty.
- Protect information regarding the public and/or the County including material on computer monitors being viewed or photographed by visitors.
- Contact your supervisor if you have a question.
- Leave the public area and move to a private area if necessary to avoid inappropriate action by you or a confrontation.
- Call 911 if individual enters into private areas or other questionable/illegal activity is observed.



# Customer Service Reminders



## Do

- Know that photography is allowed in public areas.
- Keep calm.
- Be polite/professional.
- Beware of voice tone and volume.
- Watch your body language.
- Try to keep interaction brief.
- Call police if necessary.

## Don't

- Don't tell anyone they can't photograph/film in a public area.
- Don't try to take their camera away.
- Don't use your personal phone to record anyone (potential open records request).
- Don't argue.
- Don't use profanity.
- Don't physically touch anyone.

# Any Questions?

