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THE HOWE & HUTTON REPORT

Volume 2016, Issue 10

TRENDING NOW

COURT FINDS NO EMPLOYMENT PROTECTION FOR SEXUAL ORIENTATION – In a case involving a part-time professor who claimed she was passed over for promotions, denied a full-time job, and ultimately fired because she is a lesbian, the U.S. Court of Appeals for the Seventh Circuit in Chicago held that Title VII of the federal Civil Rights Act does not protect workers from discrimination based on sexual orientation. Title VII, on its face, protects against discrimination in employment based on a worker's sex, whether male or female. But the Court of Appeals ruled that Congress, in passing the Act, did not mean to outlaw discrimination against "transgender employees, homosexuals and transvestites" if such discrimination was not directed only at men or at women. *The Court of Appeals found that, in interpreting Title VII, it was bound by its own prior rulings concerning the scope of Title VII and the fact that Congress, on numerous occasions, has refused to amend Title VII or pass other legislation to specifically protect workers from sexual orientation discrimination.*

BANK NOT LIABLE FOR WORKER'S DOUBLE CHECK CASHING – A federal judge in Chicago has held that a bank was not liable to an employer when its employee collected on the same paychecks twice, depositing her checks once in her bank through a smartphone app and then cashing them at a currency exchange. The employer argued that the bank was negligent in not establishing procedures that would prevent such double collections from occurring. Not so, said the court, because, while a bank owes a duty of care to its customers, the bank's customer, in this case, was the worker, the employer never having been a customer of the bank. As the court found that banks owe no duty of care to noncustomers, the employer's only remedy was to pursue a lawsuit against the employee. *Reports are that duplicate check cashing is a growing problem, perhaps increasing more than 1,000 percent in the last ten years.*

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NOT FOR PROFIT LAW DEVELOPMENTS

NONPROFITS LEAD VOTER REGISTRATION EFFORTS – As the 2016 elections head into the home stretch, nonprofits are leading voter registration efforts around the U.S. Though charities and other organizations exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code are prohibited from engaging in *partisan* political activity, and other nonprofits face some legal limitations on that kind of political involvement, *nonpartisan* political activity such as registering voters, getting voters to the polls, and sponsoring candidate debates is fair game for every organization. *Readers are encouraged to get out and do their civic duty. As long as you are not assisting in or advocating for the election or defeat of a candidate, you're generally on safe legal ground in merely facilitating the electoral process. Ask nonprofit legal counsel if you have concerns about specific political activities in which your organization wants to engage.*

MEETING AND TRAVEL DEVELOPMENTS

ZIKA SPREADS, BLOOD TESTS RECOMMENDED -- *H&H Report Update* **-** The Zika virus continues to spread, with more than 1,300 cases of infection in the U.S. According to the state Department of Public Health, at least 46 cases have been reported in Illinois. Meanwhile, due to indications that Zika was contracted through blood in Brazil, the Obama Administration has recommended that all donated blood be tested for Zika. *Travel to and meetings in Zika-impacted areas continue to be negatively affected by the disease. Zika can cause defects in the brains of babies born to infected women. But a recent study suggests that Zika could harm adult brains as well.*

SPORTSCASTER LOSES SUIT AGAINST HOTEL RESERVATION COMPANY – *H&H Report Update* **–** Sportscaster Erin Andrews continues suing hotels and others allegedly responsible for her being filmed by a stalker through peep holes at properties where she was staying. Michael Barrett was sentenced to prison for using peep holes in Nashville, Columbus, Ohio and Milwaukee hotel rooms so that he could film Andrews while staying in a room next door. She previously won an award of $55 million against the Nashville Marriott and the hotel's owner and management company. But Andrews has now lost a separate suit against the hotel reservation company that booked her in a Columbus hotel where such filming occurred. Andrews alleged that the Ohio hotel and the Chicago-based reservation company had engaged in a joint venture and had assumed a duty to protect her privacy, violating it when Barrett asked for and received a room next to her and recorded videos that he posted online. An Illinois appeals court, though, has now affirmed a lower court's dismissal of the suit against the reservation company, ruling that there was no joint venture, the reservation company had only contracted with the hotel to provide reservation services, and the reservation company had no duty to Andrews, who was not their customer. *Key to the Illinois court's ruling was the fact that the reservation company had no ownership or shared profit in the Ohio hotel, no access to guest names or room numbers, no employees at the hotel and no contact with Andrews.*

REGULATORY LAW DEVELOPMENTS

ILLINOIS CAN FAVOR CAUCUS COMMITTEES IN LIMITING CONTRIBUTIONS – A federal judge has rejected a challenge to Illinois laws allowing legislative caucus committees to make larger political campaign contributions than individuals and political action committees (PACs). Caucus committees are formed by legislators to solicit political contributions from their colleagues in the Illinois General Assembly. In this case, a suit was brought to invalidate as unconstitutional the state's higher contribution limits for caucus committees. But the judge concluded that higher contribution limits for caucus committees were justifiable because lawmakers could reasonably conclude that corruption by private individuals and non-legislative entities "poses a far more serious risk to the democratic process than does a legislative leader contributing to another legislator or electoral candidate in that leader's own caucus." *Oh, yes, those politicians are far more trustworthy than private individuals when it comes to political corruption! (The foregoing, of course, is said with as much sarcasm as we can manage.)*

ANTI-FRACKING MEASURES FAIL TO REACH BALLOT IN COLORADO – Two public initiatives allowing communities to ban the practice of hydraulic fracturing ("fracking") in oil and gas production failed to garner enough signatures from voters to be placed on the ballot for approval in Colorado's fall elections. Fracking is the practice of injecting water, sand and/or chemicals into the ground in order to force oil and gas out of it. *Opponents say the practice is environmentally dangerous, but they have so far been able to limit fracking statewide only in three states where it wasn't currently in use, achieving passage of preventative measures in Maryland, New York and Vermont. Some local governments in other states have also passed anti-fracking laws limited to their localities, but virtually none of those affected areas where oil and gas production was currently taking place. By contrast, Colorado's oil output alone quintupled to 327,000 barrels a day in 2015, significantly helped by the use of fracking.*

FEMA ISSUES NEW FLOOD-AREA BUILDING RULES – The Federal Emergency Management Agency has proposed new regulations that would govern construction by companies and homeowners in flood-prone areas. The regulations would require construction on higher ground if federal funds are used in construction projects. In some cases, building will have to be on ground as much as three feet higher than under current requirements. The proposed regulations stem from an executive order issued by President Obama last year as part of his agenda to address climate change. *Opponents of the regulations fear that they will drive up construction costs, and they note that the regulations might make rebuilding the recently flood-stricken areas of Baton Rouge, Louisiana more difficult. FEMA says that when federal investments are involved in construction projects, the agency wants buildings to be higher and stronger.*

REGULATORY LAW DEVELOPMENTS (cont.)

HHS TRANSGENDER RULE PROVOKES LAWSUIT – Religiously connected health care providers and five states have sued the federal government over a new regulation issued by the U.S. Department of Health and Human Services that requires hospitals, doctors and other health care providers receiving federal dollars to offer the same treatments for transgender patients as they offer for others. The rule also requires insurance companies to cover such treatments, and it provides that affected health care providers with gender-segregated facilities must offer transgender patients facilities corresponding to their gender identity. *The plaintiffs in the lawsuit, which was filed in a Texas federal court, object to the new rule because they believe doctors and hospitals will now be required to perform gender-transition procedures they find morally and religiously unacceptable, including gender reassignment surgery, hormone therapies and hysterectomies for transgender men. Advocates for transgender rights say the new rule is necessary to ensure that transgender patients receive basic medical care in some states.*

SUITS OVER TRANSGENDER BATHROOM RIGHTS MULTIPLY– *H&H Report Update* - A federal judge in Texas has temporarily blocked enforcement of U.S. Department of Education guidelines directing public schools to provide transgender students with access to bathrooms of their gender identity. Siding with 13 states that had sued to prevent enforcement of the guidelines, the judge found that required procedures allowing for public comment weren't followed when the guidelines were adopted. *North Carolina and the federal government, meanwhile, are suing each other over that state's law requiring people to use public bathrooms corresponding to the gender on their birth certificates. Earlier, the Supreme Court of the U.S. temporarily prohibited enforcement of a federal court decision that a transgender student in Virginia had a constitutional right to use the bathroom of the student's gender identity. The Supreme Court's temporary injunction allows Virginia school officials time to file an appeal of the lower court's ruling in that case, and the Supreme Court may settle this issue of bathroom rights later this year or in 2017.*

TAX LAW DEVELOPMENTS

IRS ACCEPTS LATE FILING OF FORM 8976 BY 501(c)(4) ENTITIES – Nonprofits exempt from federal income tax under Section 501(c)(4) of the U.S. Internal Revenue Code were supposed to file a Form 8976 notice of intention to operate under that section with the Internal Revenue Service by July 8. This requirement only applied to those nonprofits that had never filed a Form 1024 application for recognition of exempt status or Form 990 series annual return with the Service. But some organizations were unable to timely submit the Form 8976 because of system outages at the IRS, and the Service has now said that it will take such outages into account before imposing penalties for late filing. Those entities experiencing this problem are encouraged to submit a late filing and call the IRS at 877-829-5500. The Service says it will work with you to ensure that you are not subjected to penalties. *See, the Service is not unreasonable. But what if inability to file was due to your own system outages? In that case, the IRS may or may not be so reasonable.*

EMPLOYMENT LAW DEVELOPMENTS

COURT FINDS NO EMPLOYMENT PROTECTION FOR SEXUAL ORIENTATION – In a case involving a part-time professor who claimed she was passed over for promotions, denied a full-time job, and ultimately fired because she is a lesbian, the U.S. Court of Appeals for the Seventh Circuit in Chicago held that Title VII of the federal Civil Rights Act does not protect workers from discrimination based on sexual orientation. Title VII, on its face, protects against discrimination in employment based on a worker's sex, whether male or female. But the Court of Appeals ruled that Congress, in passing the Act, did not mean to outlaw discrimination against "transgender employees, homosexuals and transvestites" if such discrimination was not directed only at men or at women. *The Court of Appeals found that, in interpreting Title VII, it was bound by its own prior rulings concerning the scope of Title VII and the fact that Congress, on numerous occasions, has refused to amend Title VII or pass other legislation to specifically protect workers from sexual orientation discrimination.*

REPORTING SEXUAL ASSAULTS BY BOSS NOT PROTECTED ACTIVITY – A federal judge in Chicago has dismissed many federal and state law claims brought by a worker who sued her former employer for firing her when she reported being sexually assaulted by her supervisor. The former employee sued for "retaliation" under Title VII of the federal Civil Rights Act and the Illinois Human Rights Act, and she sued under Illinois law for assault, battery, negligent supervision and infliction of emotional distress. But the judge ruled that reporting sexual advances by a supervisor was not a "protected activity" under either federal or state law such that a "retaliation" claim could be supported. Further, the judge ruled that the other state law counts in the worker's complaint should be dismissed because she had not demonstrated that the employer ordered or expressly authorized the supervisor's conduct in assaulting her. *So the worker can't get justice, right? Not necessarily, since the judge allowed her to refile her complaint and proceed with "sexual harassment" claims under both Title VII and the Illinois Act. This is why plaintiffs' lawyers throw everything at the fan when they are suing. If one charge doesn't stick – or five, as in this case – another might.*

EX-CHURCH MUSIC DIRECTOR LOSES EMPLOYMENT DISCRIMINATION SUIT – In an employment discrimination suit filed against a church by its former music director, a U.S. District Court judge in Chicago has ruled that the church was within its rights in firing the director under the "ministerial exception" to the employment discrimination laws. The judge cited prior case law holding that the First Amendment to the U.S. Constitution bars "ministers" from bringing employment discrimination suits against religious institutions. In this case, the music director was considered a "minister" because he was tasked with contributing to the selection of music to be played during liturgical celebrations and he then decided *how* the music was to be played. *The music director argued that the "ministerial exception" should not apply to him because he was told that he was fired for financial, rather than religious, reasons, and he believed he was actually fired because of his national origin and age. The judge, however, said that, even if the alleged reason for an employee's firing was secular, that did not affect the application of the "ministerial exception," because it prohibits courts from looking into the reasons for a minister's termination.*

EMPLOYMENT LAW DEVELOPMENTS (cont.)

GIVE THAT WORKER A CHAIR, SAY CALIFORNIA COURTS – In several cases kicking around in California federal and state courts, employers have been sued for refusing to provide their workers a chair to sit on at work. The cases involved cashiers at CVS Pharmacy and Wal-Mart, as well as a teller for JP Morgan Chase Bank, all of whom had some duties that required them to move around, though they spent most of their work days standing in one place. Ultimately, the courts have sided with the workers, requiring that chairs be provided to them for use whenever the nature of their work allowed them to sit down, even briefly. One court noted, "There is no principled reason for denying an employee a seat when he spends a substantial part of his workday at a single location performing tasks that could reasonably be done while seated." *Some studies show that workers perform more efficiently while standing, and such efficiencies appear to be reason enough for some employers to require that workers stand. But the courts, in these cases, also gave "humane consideration for the welfare of employees" and decided that workers need not "stand" for "inhumane" treatment by their bosses.*

APPEALS COURT UPHOLDS FIRING FOLLOWING PANIC ATTACK – The U.S. Court of Appeals for the Seventh Circuit in Chicago has upheld an employee's firing for her hysterical behavior at work, even though it stemmed from an anxiety disorder. The court rejected the argument that she was fired by the Wisconsin Department of Transportation because of her disability in violation of the federal Rehabilitation Act. Instead, the court ruled that she was fired because her behavior, which included trying to cut her wrists and kicking her legs and crying out in a public place, showed she was no longer qualified to perform the essential functions of her job. *This and previous court decisions demonstrate that actions in themselves disqualifying a person from further employment will justify discharge even if they are a result of a disability.*

INTELLECTUAL PROPERTY AND LAW DEVELOPMENTS

FEDS UPDATE INTELLECTUAL PROPERTY LICENSING GUIDELINES – The Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission are proposing an update to their *Antitrust Guidelines for the Licensing of Intellectual Property,* the first since the *Guidelines* were issued in 1995. The proposed update, among other things, would reaffirm the federal government's commitment to the principle that licensing intellectual property is generally a precompetitive activity and not an anticompetitive one that would violate the antitrust laws. It would also state that minimum price restraints imposed by licensors on licensees' sales or resales of products no longer should be presumed illegal, but analyzed for reasonableness that would make them legally justifiable. Further, the update would explicitly state that the antitrust laws do not impose liability on a firm for unilaterally refusing to license its intellectual property to someone. *These are all positive changes, we think. Hopefully, they will be incorporated into final revised Guidelines.*

HOWE & HUTTON NEWS AND EVENTS

On October 13, the ***Illinois State Bar Association*** conferred its title of ***Distinguished Counselor*** to **Jonathan Howe** for his service to the Association and for his leadership and unselfish participation in the public affairs of the community, state and nation and the personal qualities exemplifying the high ideals of the profession of the Bar**. Congratulations Jonathan!**

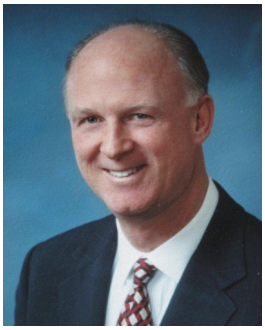
Jonathan Howe presents "Don't Overlook The Small Stuff – Contract Clauses To Which You Pay No Attention, But Should" at the Small Meetings Market conference in Huntsville, Alabama.

Jon will also participate in a "Legal Session Brainstorming" call for Financial & Insurance Conference Planners (FICP) Annual Conference.

On Friday, October 28, **Naomi Angel** presents: "A Contract's GPS: Navigating Hotel Contract Legal Issues" at the ASAE Association Law Symposium in Washington, D.C.

Lee Badger recently addressed volunteer directors and committee members of an IRC Sec. 501c3 exempt not-for-profit organization regarding fiduciary duties and liability protection and scope of immunities under the Illinois Not-for-Profit Corporation Act, including dealing with conflicts of interest in voting.

HOWE & HUTTON NEWS AND EVENTS



On Thursday, November 17, **Mike Deese** will be presenting on Current Association Legal Issues at a Leadership Forum held by Association Headquarters, Inc. in Mt. Laurel, NJ for the volunteer leaders of its association clients.

Christina Pannos and Ahmet Ogut, an internationally acclaimed visual artist recently led a workshop hosted by Gallery 400 at UIC: *Professional Artist's Toolkit: Artists' Contracts*, The workshop was a detailed discussion of Ogut's Agreement of Transfer and focused on issues such as artists' rights, resale rights, and contract construction. Students and artists alike actively participated in the workshop. *In her spare time away from Howe & Hutton, Christina teaches Legal Drafting: Art Market Transactions at DePaul University College of Law.*

Gerard P. Panaro will be presenting a webinar for ASAE in November on the U.S. Department of Labor's new overtime regulations.

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