



## HSVPOA BOD – Education on Employment Law

### Description

By Cheryl Dowden, December 19, 2019

HSVPOA Board of Directors participates in four Board education segments a year. The quarterly Board education on December 18, 2019, featured [Attorney Cindy Kolb](#). Attorney Kolb gave a very informative presentation on federal and state employment laws.

Ms. Kolb is a Director and has practiced law at Cross, Gunter, Witherspoon & Galchus, P.C. in Little Rock for over twenty years. Her areas of practice involve employment law, insurance defense, and insurance coverage.

Attorney Kolb stated that at her firm, "We practice mainly employment defense litigation. So my focus has always been on employment law. I am going to give you just a little bit of an overview. Employment law is a course you can take in law school for a whole semester. This is going to be a brief overview to bring some issues to the forefront of the Board's mind and also I will leave a little time for questions if something comes up in particular."

Attorney Kolb said employment law is kind of like alphabet soup. There's the ADA, FMLA, etc.

Kolb: "There are federal and state employment laws that apply to employers. And mainly these laws address issues of discrimination or potential issues of discrimination."

Kolb stated these laws are designed to protect employees from "adverse actions by their employers, based on illegal reasons."

[Arkansas is an at-will employment state](#) if you do not have an employment contract. If you have a contract, you can only be disciplined or terminated under the terms of your contract.

Kolb: "Most employees that are in Arkansas are at-will employees, meaning they can be terminated for a good reason, a bad reason, no reason, but not for an illegal reason."

Kolb said illegal reasons are those that violate federal or state law.

## **Federal law**

### **Title VII of the Civil Rights Act of 1964**

Title VII applies to all employers who have 15 or more employees.

Kolb: "Title VII prohibits discrimination in all areas of an employer-employee relationship. That means everywhere from an applicant"... all the way through to promotions, evaluations, discipline, termination.

Kolb: "Title VII protects an employee from discrimination on the basis of race, color, sex or gender, religion or national origin."

Kolb: "In order for an employee to bring a claim" [lawsuit] "they have to first go and file a charge with the Equal Employment Opportunity Committee."

Kolb: Employers have duties to prevent discrimination and harassment. "Employers can be held liable if they don't take action."

Kolb: "A successful plaintiff can obtain remedies if they win the lawsuit:

- backpay,
- front pay,
- attorney fees,
- compensatory damages,
- punitive damages, and
- injunctive relief."

Kolb: "Injunctive relief means sometimes the court or an agency can order that someone be put back to work if they were fired. Or if they were demoted, that they are put back into their original position."

## **Americans with Disabilities Act**

Another main federal law that addresses discrimination is the [\*\*Americans with Disabilities Act\*\*](#). You cannot harass or discriminate against someone based on their disability.

Employers must provide reasonable accommodations.

Kolb said, "Reasonable is a moving target." "Reasonable depends on what accommodation is being requested, the size of the employer, the financial situation of the employer."

Kolb: "The ADA states that you can't discriminate against an employee who is able to perform the essential functions of their job, with or without an accommodation."

If the employer feels they cannot accommodate the employee, they need to have a discussion with the employee to determine if something else can be done.

Difficult accommodations could be:

- A different schedule is needed.
- I am unable to perform this function of my job and I want someone else to do it.

An employer is not required to hire a new employee to do an essential function of someone's job.

The law treats a marginal function differently. An employer is required to accommodate a marginal function.

This is complicated and each case is different and requires an interactive process with the employee.

### **Age Discrimination and Employment Act of 1967 (ADEA)**

The [ADEA](#) applies to employers who have 20 or more employees. The cutoff age is 40.

Kolb: "Forty or older is a protected age."

### **Arkansas state law**

#### **[Arkansas Civil Rights Act of 1993](#)**

Kolb: "The Arkansas Civil Rights Act of 1993 (ACRA) is a smaller version of the Title VII and the ADA, together."

Kolb: Arkansas didn't include a provision for age discrimination in the ACRA.

### **Differences between Title VII and ACRA**

Kolb: The biggest difference between ACRA and Title VII is the size of the employer. "Under the Arkansas Civil Rights Act, you only need to have nine employees for it to apply to you."

The second big difference between the two laws is with the ACRA is, as an employee, you can go straight to state court. This must be done within a year of the complaint.

### **Similarities between Title VII and ACRA**

There are caps on the amounts paid for damages with both the federal and the state law. The caps correspond with the size of the employer. The bigger the employer, the greater the damages an employee can win.

Retaliation is prohibited by law under both laws. Most claims allege retaliation.

Kolb: "It is really easy for employers to take action that could at least be perceived as retaliatory."

Retaliation is a very difficult charge to defend. It is a very difficult claim to defend..."

A jury can often find it difficult to believe that in this day and age that people discriminate based on such things as gender or race.

Kolb: "They are more willing to believe it was maybe a different issue that led to the termination. But by gosh, they'll believe right away that you were mad about it when someone said you discriminated and your actions that you took were in retaliation for someone complaining."

Kolb: "Retaliation is when an employee engages in a protected activity, which for example could be complaining to their boss or filing an EEOC [\[Equal Employee Opportunity Commission\]](#) charge, or taking some steps to complain about discrimination."

Kolb: "And because they complained, because they engaged in that protected activity, they were subject to an adverse employment action." This could include termination or a poor review, a less desirable job assignment or shift.

Kolb: "The other final issue on retaliation is that the employee doesn't have to win their underlying lawsuit. So I could file a lawsuit and say I was sexually harassed at work. My boss is a jerk and he did these creepy things and then when I complained about it, he fired me." Sometimes the jury does not believe the harassment claim was proven. You can still win the retaliation claim if the jury determines you were fired because you made the complaint, even if the harassment did not happen.

## **Fair Labor Standards Act**

The [Fair Labor Standards Act](#) (FLSA) "establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in Federal, State, and local governments."

Kolb: "There are at least three FLSA lawsuits filed per day in Arkansas. It is THE hot topic." These lawsuits have to do with the nonpayment of overtime wages.

The FLSA "applies to almost all employers and has a limit of \$500,000 in sales or if the employer is engaged in interstate commerce."

Engagement in interstate commerce can include making long-distance calls, the ordering of supplies from another state, and having out-of-state customers.

Kolb: "Pretty much every employer is subject to the Fair Labor Standards Act."

The FLSA sets a 40-hour workweek.

## **Fair Labor Standards Act exempt and nonexempt employees**

If you are exempt from the FLSA, your employer doesn't have to pay you time and a half for hours exceeding 40 hours per week.

Nonexempt employees must be paid time and a half for hours exceeding 40 hours a week.

Type of exemptions:

- administrative exemption,
- professional exemption, and
- highly-compensated employee exemption.

Often employers attempt to make all employees exempt. But there are mandatory requirements for exemption status.

The [Arkansas Minimum Wage Act](#) is similar to the FLSA. In January the Arkansas minimum wage raises to ten dollars an hour.

### **The Equal Pay Act (EPA) of 1963**

The [Equal Pay Act](#) prohibits discrimination based on gender. This falls under the Fair Labor Standards Act.

### **Questions from the Board**

Director Podawiltz asked about 'comp time'. "How does that work in regards to the 40-hour workweek situation?"

Attorney Kolb explained that "comp time" is not for private employers and only affects government. She said that sometimes private employers don't realize this and give employees "comp time".

Kolb: "'Comp time' is generally used for a public employer in lieu of overtime." Instead of being paid time and a half, the public employee can sometimes request extra time off equal to the overtime they worked.

Director Campagna: "When I listen to your presentation, what comes across to me is that everything in all these acts is commonsense." People should treat other people the way they want themselves to be treated and there would be fewer lawsuits.

Kolb: "Ninety percent of the time it is not a discrimination issue. It is a communication issue."

Director Erickson: "What percentage of our employees are exempt versus nonexempt?"

Approximately seventy-five employees are exempt and around 250 employees are non-exempt.

Thank you, Attorney Cindy Kolb, for your well-expressed and educational presentation to Hot Springs Village Property Owners Association Board of Directors and Property Owners.

By [Cheryl Dowden](#), December 19, 2019

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