



Proceedings

A monthly newsletter from McGraw-Hill Education



October 2016 Volume 8, Issue 3

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Dear Professor,

The fall season has arrived! Welcome to McGraw-Hill Education's October 2016 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 8, Issue 3 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the October 2016 newsletter topics with the various McGraw-Hill Education business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. The sexual harassment lawsuit involving former *Fox and Friends* co-host Gretchen Carlson, former Fox News Chairman and Chief Executive Officer Roger Ailes, and 21st Century Fox;
2. An Indiana mother's religion-based defense to child abuse charges;
3. President Barack Obama's nomination of the first Muslim judge to the United States District Court bench;
4. Videos related to a) President Obama's nomination of Judge Merrick Garland to the United States Supreme Court and b) government restriction of transgender bathroom access;
5. An "ethical dilemma" related to San Francisco 49ers (N.F.L.) quarterback Colin Kaepernick's refusal to stand during the national anthem and President Obama's support of Kaepernick's freedom of expression; and
6. "Teaching tips" related to Article 1 ("Fox Will Pay Gretchen Carlson \$20 Million to Settle Sexual Harassment Suit") and Article 2 ("Woman Uses Indiana Religious Objections Law in Defense against Child Abuse Charges") of the newsletter.

Happy fall season, everyone!

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Of Special Interest

This section of the newsletter covers three (3) topics:

- 1) The sexual harassment lawsuit involving former *Fox and Friends* co-host Gretchen Carlson, former Fox News Chairman and Chief Executive Officer Roger Ailes, and 21st Century Fox;
- 2) An Indiana mother's religion-based defense to child abuse charges; and
- 3) President Barack Obama's nomination of the first Muslim judge to the United States District Court bench.

Hot Topics in Business Law

Article 1: "Fox Will Pay Gretchen Carlson \$20 Million to Settle Sexual Harassment Suit"

<http://www.npr.org/sections/thetwo-way/2016/09/06/492797695/fox-news-will-pay-gretchen-carlson-20-million-to-settle-sexual-harassment-suit>

According to the article, two months after former *Fox & Friends* co-host Gretchen Carlson accused Fox News' then-Chairman Roger Ailes of sexual harassment, the network's parent company has agreed to pay Carlson \$20 million and make a "highly unusual public apology."

News of the settlement was first reported recently by *Vanity Fair*; a source with knowledge of the settlement then confirmed the deal, and the company later issued a statement about it.

"We sincerely regret and apologize for the fact that Gretchen was not treated with the respect and dignity that she and all of our colleagues deserve," 21st Century Fox says in part of that statement.

In another development at Fox News, longtime anchor Greta Van Susteren is leaving the network. The departure is immediate. Van Susteren "had initially dismissed" the seriousness of Carlson's allegations.

As for Carlson, she recently tweeted, "I'm ready to move on to the next chapter in my life."

"The accusations are not subtle," David reported in July, describing Carlson's lawsuit.

Here's a brief summary from that report:

"In a lawsuit filed in a New Jersey civil court, lawyers for Carlson allege Ailes repeatedly dismissed her concerns that her colleagues on *Fox & Friends* had created a pervasively sexist atmosphere, telling her to learn to 'get along with the boys.'

"When Carlson met with Ailes to complain, she alleges Ailes replied, 'I think you and I should have had a sexual relationship a long time ago.' The suit says Ailes explained, 'Sometimes problems are easier to solve that way.' In other conversations, Carlson contends, Ailes underscored what he could do for her



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career if she would look upon his invitations favorably. And she says he frequently ogled her, commenting on her figure and telling her to turn around so he could see her rear."

Carlson, whose contract with Fox News expired in June, says her refusal of sexual advances led to recrimination that included a pay cut, a shift to a lower-profile afternoon show, and the lack of chances to conduct important interviews.

Ailes initially said Carlson's "allegations are false" and that she had sued in retaliation after her contract wasn't renewed. But two weeks after the suit was filed, Ailes resigned from his post as chairman and CEO of Fox News.

In the wake of Carlson's suit, other women who worked at Fox came forward with similar allegations — including anchor Megyn Kelly, and Andrea Tantaros, the host of *The Five*, among others.

Problems at Fox News extended beyond Ailes, according to author Gabriel Sherman. Here's some of what Sherman, who wrote a book about Ailes and the rise of Fox News, had to say:

"It's not about Roger Ailes. It's about a culture — a television news network that played an undeniable role in reshaping American politics over the last 20 years. And it was a culture where this type of behavior was encouraged and protected. The allegations are that women routinely had to sleep with or be propositioned by their manager — in many cases, Roger Ailes, but I've reported on another manager who did this — in exchange for promotions.

"And so this is a culture where women felt pressured to participate in sexual activity with their superiors if they wanted to advance inside the company. And it was so — it was shocking to me — it was not that it occurred, but that it was so explicit, that it was — there was no subtext.

There was no subtlety to it. It was just there. It was just almost blatantly stated. If you want this, you have to have sex with me or allow me to make sexually unwanted comments about you. And it was so blatant that it's almost now unbelievable. But it — we're learning more and more every day. This is what women who worked there had to endure for the last 20 years."

Recently, both 21st Century Fox and Carlson issued statements about the settlement.

Here's 21st Century Fox:

"21st Century Fox is pleased to announce that it has settled Gretchen Carlson's lawsuit. During her tenure at Fox News, Gretchen exhibited the highest standards of journalism and professionalism. She developed a loyal audience and was a daily source of information for many Americans. We are proud that she was part of the Fox News team. We sincerely regret and apologize for the fact that Gretchen was not treated with the respect and dignity that she and all of our colleagues deserve."

And here's Carlson:



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"I am gratified that 21st Century Fox took decisive action after I filed my Complaint. I'm ready to move on to the next chapter of my life in which I will redouble my efforts to empower women in the workplace. I want to thank all the brave women who came forward to tell their own stories and the many people across the country who embraced and supported me in their #StandWithGretchen. All women deserve a dignified and respectful workplace in which talent, hard work and loyalty are recognized, revered and rewarded."

Discussion Questions

1. Define sexual harassment.

According to the Equal Employment Opportunity Commission (EEOC) website (https://www.eeoc.gov/laws/types/sexual_harassment.cfm):

It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

2. In your reasoned opinion, is the \$20 million settlement amount reasonable? Why or why not?

This is an opinion question, so student responses may vary. It is important to note that this case was resolved by way of settlement, meaning that all parties involved consented to the terms of the settlement agreement, including the financial terms. In the "for what it's worth" category, an online search of Gretchen Carlson's salary at 21st Century Fox revealed that she received an annual salary of \$800,000 prior to her termination of employment.

3. In terms of the \$20 million settlement, 21st Century Fox will pay the entire settlement amount, while Roger Ailes will pay nothing. In your reasoned opinion, is this fair? Why or why not?



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This is an opinion question, so student responses may vary. It is important to note that this case was resolved by way of settlement, meaning that all parties involved consented to the terms of the settlement agreement, including which party would pay the \$20 million settlement amount. For some, it might be troubling to realize that the alleged offender, Roger Ailes, paid nothing toward Carlson's sexual harassment case settlement and yet was paid \$40 million from 21st Century Fox to leave the company (<http://money.cnn.com/2016/07/21/media/roger-ailes-leaves-fox-news/>).

Article 2: "Woman Uses Indiana Religious Objections Law in Defense against Child Abuse Charges"

<http://www.chicagotribune.com/news/local/breaking/ct-woman-uses-indiana-religious-objections-law-in-defense-against-child-abuse-charges-20160831-story.html>

According to the article, the attorney for a woman charged with child abuse for allegedly beating her son with a coat hanger says Indiana's religious objections law gives her the right to discipline her children according to her evangelical Christian beliefs.

Kihn Par Thaing, 30, of Indianapolis was arrested in February on felony abuse and neglect charges after a teacher discovered her 7-year-old son's injuries. Thaing is accused of beating her son with a coat hanger, leaving him with 36 bruises and red welts.

Her attorney, Greg Bowes, argues in court documents filed July 29 that the state shouldn't interfere with Thaing's right to raise her children as she deems appropriate. He cited Indiana's Religious Freedom Restoration Act as part of her defense, saying it gives her the right to discipline her children according to her beliefs.

Court documents cite biblical Scripture and state that a parent who "spares the rod, spoils the child."

Marion County Deputy Prosecutor Matt Savage said in an August 5 response that the boy's beating went "beyond these religious instructions" and said Indiana's compelling interest in preventing child abuse outweighs religious protections in state law.

Indiana's religious objections law, signed by Republican Gov. Mike Pence last year, prohibits government entities from substantially burdening religious liberties, unless by the least restrictive means to further a compelling government interest.

But nothing in the law specifically mentions parenting and the statute hasn't yet been substantially tested in the courts.

Bowes also cites in his client's defense a 2008 Indiana Supreme Court decision that affirmed the parental right to discipline children in ways parents consider appropriate, even when others could deem that behavior as excessive.



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According to court documents, Thaing said she stopped her son from dangerous behavior on February 3 that would have seriously harmed his 3-year-old sister and hit both children with a plastic coat hanger before telling them to pray for forgiveness.

Child welfare officials took the children into their care in February, but it's unclear where they are now. Bowes' attorney and a spokeswoman for Marion County's prosecutor said they could not comment on the children's whereabouts.

Thaing, who faces an October 19 trial, is a refugee from Myanmar, a Southeast Asian nation also known as Burma, and was granted political asylum in the U.S. She cited cultural differences between the two countries as part of her defense.

Elaisa Vahnne, the executive director of the Burmese American Community Institute in Indianapolis, said what might be seen as a crime in Indiana may be considered typical parenting in Myanmar.

"Sometimes you use a stick to correct them (in Myanmar). That's very normal," she said.

Discussion Questions

1. Describe the "Free Exercise" Clause of the First Amendment to the United States Constitution.

According to the specific language of the First Amendment to the United States Constitution:

*Congress shall make no law respecting an establishment of religion, **or prohibiting the free exercise thereof** (emphasis added).*

Our Founding Fathers included the Free Exercise Clause to promote freedom of religion in the United States.

2. As the article indicates, Indiana's religious objections law, signed by Republican Governor Mike Pence in 2015, prohibits government entities from substantially burdening religious liberties, unless by the least restrictive means to further a compelling government interest. In your reasoned opinion, how does this law apply to the subject case?

In your author's opinion, even though Indiana's religious objections law is designed to further promote religious freedom in the "Hoosier State," the law by its own terms does not condone absolute, unrestricted religious freedom. Instead, by its own terms, the state may restrict religious freedom by the "least restrictive means" in order to further a "compelling government interest." In your author's opinion, child welfare is a compelling government interest, and reasonable governmental oversight of parental methods and manners of child punishment would constitute the least restrictive means by which to further such an interest.



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3. In your reasoned opinion, should Kihn Par Thaing be held criminally responsible for child abuse? Why or why not?

This is an opinion question, so student responses may vary. In your author's opinion, the fact that Kihn Par Thaing is from Myanmar (where, according to the author, parents sometimes use a "stick" to "correct" children), should have no bearing on the case; instead, Thaing should be judged based on standards of reasonableness for child punishment recognized in the United States.

Article 3: "Obama Nominates First Muslim Federal Judge"

<http://www.cnn.com/2016/09/07/politics/obama-nominates-first-muslim-judge/index.html>

According to the article, President Barack Obama has nominated a Washington lawyer to the U.S. District Court bench who would become the country's first Muslim-American federal judge if he is confirmed.

Abid Riaz Qureshi is a lawyer at the Latham & Watkins law firm in Washington, specializing in health care fraud and securities violations, according to the White House. Obama nominated him to serve on the US District Court for the District of Columbia.

"I am pleased to nominate Mr. Qureshi to serve on the United States District Court bench," Obama said in a statement. "I am confident he will serve the American people with integrity and a steadfast commitment to justice."

Muslim-American activists hailed the President's move.

"The nomination of Abid Qureshi to fill a seat on the U.S. District Court for the District of Columbia sends a message of inclusion that is welcomed by the American Muslim community and by all Americans who value diversity and mutual respect at a time when some seek division and discord," said Nihad Awad, the National Executive Director of the Council on American-Islamic Relations.

Obama has made diversity a priority in his judicial nominations. He's appointed more women, African-Americans and Hispanics to the federal bench than his predecessors, and also worked to name judges with a wider array of work experience.

But the Senate has been slow in confirming Obama's nominees, and halted any progress on judicial nominations until after Obama's term ends in January, including Obama's Supreme Court nominee Merrick Garland.

That makes it unlikely Qureshi will be confirmed in the months left of Obama's tenure, unless lawmakers take up his nomination in a lame duck session.



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Discussion Questions

1. With regard to the judiciary, discuss the importance of diversity.

Diversity in the judiciary is arguably more democratic and representative of the people as a whole. It is also consistent with the basic notion of the Civil Rights Act, that no one should be subjected to race, gender, national origin, cultural, or religious discrimination.

2. As the article indicates, the United States Senate has been slow in confirming President Obama's judicial nominees. In your reasoned opinion, does the Senate have a good faith obligation to consider the president's judicial nominees? Why or why not?

Arguably, the Senate has a good-faith obligation to consider the president's judicial nominees, regardless of the political affiliation of the president and Senate leadership. In your author's opinion, a judicial nomination should not be delayed or rejected purely on political grounds; instead, the exclusive "litmus test" for any judicial candidate should be the candidate's qualifications and fitness to serve. If politics becomes the litmus test, and if both parties "play the game" of politics, our judicial system would eventually come to a grinding halt!

3. As the article indicates, it is unlikely that Qureshi will be confirmed in the months left of Obama's tenure, unless lawmakers take up his nomination in a "lame duck" session (the period of time after the election and before the new president takes office and the new Senate convenes). Why would lawmakers take up Qureshi's nomination in a lame duck session?

Assuming that Qureshi's nomination is not being currently considered for political reasons, lawmakers might consider his nomination in a "lame duck" session if the opposing candidate wins the presidential election and Senate leadership believes that the new president would offer up an even more "unsuitable" (for political purposes) candidate. The same could be said for current United States Supreme Court nominee Merrick Garland. In terms of Supreme Court nominees, Judge Garland has the distinction of waiting the longest for a United States Senate hearing to consider his nomination. That wait might come to an abrupt end if Hillary Clinton is elected president of the United States. There is already some talk that if she is indeed elected, the Senate will take up Judge Garland's nomination in the "lame duck" period leading up to her "swearing in" ceremony on January 20, 2017.



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Video Suggestions

Video 1: “Senator Chuck Grassley is Still Against Merrick Garland”

http://www.huffingtonpost.com/entry/merrick-garland-scotus_us_57cf3054e4b06a74c9f15393?section=&

Note: In addition to the video, please see the following article, also included at the above-referenced internet site:

“Harry Reid Vows to Jam Up Committee Meetings Until GOP Moves On Supreme Court Vacancy”

According to the article, going on vacation doesn't make all your problems go away, as Congress will find out as it returns from its seven-week break. The budget is still set to run out, Zika is still spreading and the Supreme Court is still missing a ninth justice.

Supporters of Merrick Garland plan to make sure that the public remembers Congress has work to do as senators try to awkwardly look the other way.

Senate Minority Leader Harry Reid (D-Nev.) took to the floor recently and said Democrats will prevent committees from fully functioning until Republicans agree to move forward on Garland:

To show the American people's absolute disgust with how Republicans have treated Merrick Garland's nomination, starting today, I'm objecting to committees meeting for other purposes until the Judiciary Committee schedules a meeting to consider Judge Garland's nomination.

If the Republican leader thinks there is a committee that needs to meet because of extraordinary circumstances, I would be pleased to consider his request. But in the meantime, as of today, we're objecting to committees meeting, in line with the rules of the Senate.

Senate rules require unanimous consent for committees to meet after the Senate has been in session for two hours or after 2 p.m. That consent is normally granted without any controversy. So Reid won't be able to block all committees from meeting, but he will be able to significantly restrict the time in which they can do so.



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“Hard to complain about obstruction or things not getting passed or nominees not being confirmed when you’re slowing down the work of the committees though, right?” said Don Stewart, spokesman of Senate Majority Leader Mitch McConnell (R-Ky.). “And it inconveniences the Democrat members of the committee just as much as Republicans; Democrat-called witnesses as much as GOP.”

“It’s not an effective or sustainable position,” he added.

President Barack Obama first nominated Merrick Garland, the chief judge of the D.C. Circuit Court of Appeals, to the Supreme Court on March 16. Garland still has not received any hearings before the Senate Judiciary Committee. Republicans have vowed to block him not because of his qualifications but because they say Obama shouldn’t get to choose the replacement for the late Justice Antonin Scalia. They instead want the next president to choose, hoping that Donald Trump wins the election.

Garland now has the unfortunate distinction of being the Supreme Court nominee who has gone the longest without a hearing.

A group of Garland’s former clerks plan to hold a press conference at the Supreme Court, pressing for a vote. The event is organized by We Need Nine, an advocacy group pushing for Garland’s nomination.

The clerks will then hold meetings on the Hill, including with the offices of Sens. Bob Casey (D-Pa.), Kirsten Gillibrand (D-N.Y.) and Pat Toomey (R-Pa.). Sen. Kelly Ayotte’s (R-N.H.) office declined to meet with them. Her spokesperson did not return a request for comment.

The events will be part of an effort to renew the push for Garland, even as Republicans like Sen. Chuck Grassley (R-Iowa), who chairs the Judiciary Committee, say they won’t budge on giving him a vote.

McConnell “has been crystal clear for the last seven months,” an aide to the senator told Reuters. “The next president will select the nominee.”

This sort of political obstinance is sad and frustrating to Garland’s former clerks, who say they can’t imagine someone more qualified to be a justice. They will try to show Wednesday why those who know the judge best believe this is such an important issue. Temple University law professor Craig Green, who clerked for Garland from 2000-2001, called the delay “dangerous and disgraceful.”

“I think you can expect the Garland nomination to be brought up in any future scenario in the fourth year of a presidency not to confirm a justice for purely partisan reasons,” Green predicted. “Again, the thing I just keep coming back to is, you never need a Supreme Court until you do.”



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“He’s just not getting a fair hearing and an opportunity for the American people to hear more about his story, to hear him answer any questions that senators may have,” added David Zions, who clerked for Garland from 2008-2009 and is now a lawyer at Covington and Burling. “It’s unfortunate that someone who has given back so much to the country and who has really been a model judge can’t get a hearing on the merits and can’t have his record considered on its own.”

Garland has engendered deep loyalty from his clerks. Sixty-eight of his former clerks signed a letter in April urging the Senate to confirm him. The only three who withheld their signature did so because they’re currently clerks for Supreme Court justices.

Erin Murphy, a law professor at New York University who clerked for Garland from 1999-2000 and helped organize the clerks’ letter, said the judge goes above and beyond in mentoring the people who work for them, keeping in touch and hosting an annual reunion for all the clerks at his house. She rescheduled the class she teaches Wednesday in order to travel to Washington to help her former boss.

“In his professional career, his good judgment is evident, [as are] his thoughtfulness and his carefulness and his care and his humanity, but it’s also true for his personal judgment,” she said. “So a lot of us look up to him as someone who’s made the kind of life for himself that we aspire to both personally and professionally.”

All three clerks couldn’t believe that a man who has worked so hard to separate himself from politics has been caught up in this firestorm. Garland is widely known as a moderate, centrist judge — which was a bit of a disappointment to some progressives who were hoping Obama would nominate someone more to the left.

Green said he remembered Garland as one of the only people he knew not rooting for a side when the Supreme Court was deciding *Bush v. Gore* after the 2000 elections.

“He was as attentive as the rest of us,” Green said, “but it didn’t really strike me until later that he didn’t follow it with the same sort of attitude that I and most everybody I knew followed it with — that kind of rooting interest.”

“To see a judge who we know embodies all of the best values of the judicial branch — the impartiality, the deep respect for the constitution, the deep respect for the rule of law, the commitment to those principles above all other things — to see him dragged into this kind of muck,” Murphy added, “is heartbreaking.”

Discussion Questions

1. According to Temple University law professor Craig Green, “You never need a Supreme Court until you do.” Assess Professor Green’s statement.



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This statement is subject to interpretation, so student responses may vary. In your author's opinion, this means that the United States Supreme Court receives little attention until it takes up and decides significant cases. The Supreme Court does have a great deal of power, and that power can affect the entire population. That power is attenuated when the Court has an even number of justices, since a majority vote is required for a decision (The Court normally operates with nine justices). If the Court operates with only eight justices (as it has been doing since Justice Antonin Scalia died in February 2016) and a vote on a particular case is tied at 4-4 (as it has been for several cases since Scalia died), the Supreme Court decision has no legal effect, and the lower court (intermediate appellate court) decision stands.

2. As the article indicates, Merrick Garland now has the unfortunate distinction of being the Supreme Court nominee who has gone the longest without a hearing. In your reasoned opinion, does Senate leadership have a good-faith obligation to consider (i.e., hold hearings regarding) Judge Garland's nomination? Why or why not?

As mentioned previously in response to Article 3, Discussion Question Number 2, arguably, the Senate has a good-faith obligation to consider the president's judicial nominee regardless of the political affiliation of the president and Senate leadership. In your author's opinion, a judicial nomination should not be delayed or rejected purely on political grounds; instead, the exclusive "litmus test" for any judicial candidate should be the candidate's qualifications and fitness to serve. If politics becomes the litmus test, and if both parties "play the game" of politics, our Supreme Court would eventually come to a grinding halt!

3. Senate Minority Leader Harry Reid (D-Nev.) took to the floor recently and said Democrats will prevent committees from fully functioning until Republicans agree to move forward on Garland. In your reasoned opinion, is Senator Reid's retaliatory gesture a wise political move? Is it wise from the standpoint of a functioning federal government? Explain your response.

In your author's opinion, Senate Minority Leader Reid has no real power to compel the Senate to entertain Judge Garland's nomination; instead, that power rests with Senate leadership. Full-scale political "warfare" would result in a dysfunctional, ineffective "government" that does not actually govern.

*As a side note, it may surprise some readers of the article that Senate rules require unanimous consent for committees to meet after the Senate has been in session for two hours or after 2 p.m. For your author, the following lyrics from the song "Merry Old Land of Oz" (from the movie *The Wizard of Oz*) come to mind:*

*We get up at twelve and start to work at one
Take an hour for lunch and then at two we're done
Jolly good fun!*



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Video 2: “Texas Judge Blocks Obama’s Transgender Rules”

<http://abcnews.go.com/US/virginia-students-return-school-supreme-court-mulls-transgender/story?id=41894001>

Note: In addition to the video, please see the following article, also included at the above-referenced internet address:

“Trans Teen Returns to Virginia School as Supreme Court Considers Bathroom Access”

According to the article, students returned to school in Gloucester, Virginia under a cloud of uncertainty, as the state awaits a decision from the U.S. Supreme Court regarding transgender bathroom access.

Gloucester faces scrutiny as Virginians await word from the Supreme Court on a suit filed by Gloucester High School senior Gavin Grimm.

Grimm, a transgender student, sued the school board over its policy requiring students to use restrooms corresponding to their assigned sex at birth or a private, single-stall restroom. A series of appeals eventually brought the issue to the highest court in the land.

Grimm will not be permitted to use the same restroom as his male classmates, although he started living his life as a boy several years ago, he said.

The Supreme Court agreed in August to allow the Gloucester County School Board to stop Grimm from using the boys' bathroom — at least until the justices decide whether to examine an appeals court ruling on the case. Of the eight justices currently serving on the Supreme Court, four must agree to review Grimm's case for it to go forward.

The Associated Press reported that the decision about whether to review Grimm's case would likely be made in the fall.

Should it go forward, it would help bring one of the most fiercely debated cultural issues of 2016 closer to legal settlement and affect many transgender students beyond Grimm.

The Associated Press has reported that Grimm said he did not anticipate his case would rise to the national level and he called the attention being paid to him in school a "burden."

"I've been bullied all my life," he told the AP. "I have a lot of things here that I'd like to distance myself from."

But he stressed the discomfort he feels in being made to use the girls' bathroom.



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Grimm received permission to use the boys' restroom at the high school in 2014 for several weeks, after informing the school about his transition.

Then in December 2014 the school board adopted its current policy, in response to parents' complaints. The board voted 6-1 in favor of the new policy, according to public meeting minutes posted online.

The Gloucester County School Board did not immediately respond to a request for comment regarding the case.

Claire Gastañaga, the executive director of the ACLU Virginia, which represents Grimm, said that she is "disappointed" by the fight the school board has waged against her client and suggested that it "caved to pressure from parents" without giving appropriate consideration to his feelings.

"Gavin has a right to be free from discrimination," Gastañaga said.

She said the ACLU expects the Supreme Court to review the case this fall.

Discussion Questions

1. What federal laws justify the United States Supreme Court's review of this case?

In your author's opinion, the operative legal question in this case relates to whether it would deny Justin Grimm his constitutional right to equal protection if the Gloucester County (Virginia) School Board prevents Grimm from using the restroom consistent with his gender "identity" and instead requires Grimm to use the restroom consistent with his assigned sex at birth (or a private, single-stall restroom.)

According to the particular language of the Fourteenth Amendment to the United States Constitution:

"No state shall...deny to any person within its jurisdiction the equal protection of the laws."

2. According to the Williams Institute, the transgender population represents only about 0.3 percent of the overall population of the United States. In your reasoned opinion, should the United States Supreme Court review a case involving such a small percentage of the overall population? Why or why not?

In your author's opinion, the fact that the transgender population represents only about 0.3 percent of the overall population of the United States should not affect the Supreme Court's decision to review the case. The case concerns the interpretation and application of the United States Constitution and constitutional rights. In your author's opinion, if even one person's constitutional rights are being denied, such a violation should merit Supreme Court review



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(unless the Court is certain that the individual's constitutional rights are protected by way of a lower court—intermediate appellate court or trial court—decision).

3. In your reasoned opinion, if the United States Supreme Court chooses to review the subject case, will the Court uphold the Gloucester County (Virginia) School Board policy requiring students to use restrooms corresponding to their assigned sex at birth or a private, single-stall restroom? Explain your response.

This is an opinion question, so student responses may vary. Currently, the Supreme Court consists of eight (8) justices (there has been an opening for a ninth justice since Judge Antonin Scalia's death—see Video 1 and its accompanying article in this newsletter), with four justices typically voting as a liberal/progressive block, and four justices typically voting as a conservative block. If the Supreme Court takes up the case, this could result in a 4-4 vote, meaning that the decision of the intermediate appellate court would stand. In April 2016, the United States Fourth Circuit Court of Appeals in Richmond, Virginia ruled in favor of Grimm. This means that a tie vote at the Supreme Court level would effectively mean a victory for Grimm.



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Of Special Interest

This section of the newsletter addresses San Francisco 49ers (N.F.L.) quarterback Colin Kaepernick's refusal to stand during the national anthem and President Obama's support of Kaepernick's freedom of expression.

Ethical Dilemma

“Obama Says Colin Kaepernick Is ‘Exercising His Constitutional Right’”

<http://www.nytimes.com/2016/09/06/sports/obama-colin-kaepernick-national-anthem.html>

According to the article, President Obama said recently that Colin Kaepernick, the San Francisco 49ers quarterback, was “exercising his constitutional right” by refusing to stand during the national anthem, a decision that has fostered considerable controversy since he first took the action on August 26.

While noting the significance of the flag and the national anthem, the president said there was a long history of sports figures making political statements.

“I think he cares about some real, legitimate issues that have to be talked about,” President Obama said during a news conference in China. “And if nothing else, what he’s done is he’s generated more conversation around some topics that need to be talked about.”

It was the first time that the president had weighed in on Kaepernick’s actions, which many have criticized as being disrespectful to the United States.

Kaepernick, who is biracial and was adopted by white parents, first caused an uproar late last month when he remained seated before a 49ers preseason game with the Green Bay Packers. He said afterward that he would not “stand up to show pride in a flag for a country that oppresses black people and people of color.”

Recently, before the team’s final preseason game, in San Diego, Kaepernick chose to kneel during the anthem. He later said he intended to continue his protest into the regular N.F.L. season.

“Once again, I’m not anti-American,” Kaepernick said recently. “I love America. I love people. That’s why I’m doing this. I want to help make America better. I think having these conversations helps everybody have a better understanding of where everybody is coming from.”



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Not long ago, Kaepernick was one of the game's top players, leading the 49ers to the Super Bowl in the 2012 season and to the N.F.C. championship game the next year. But he was benched halfway through last season and will start the 2016 season as the backup to Blaine Gabbert.

Kaepernick was frequently booed during the team's final preseason game, and the police union in Santa Clara, California, has threatened to stop working 49ers home games this season because of Kaepernick's actions. Donald J. Trump, the Republican presidential nominee, is among those who have denounced him.

Nevertheless, his stance has also led to numerous expressions of support, with backers arguing that his protest is a worthy statement on the troubled status of race relations in the United States. And even though he is a backup quarterback, his jersey is now the fifth-best seller at the N.F.L.'s official online store.

Seattle defensive back Jeremy Lane said he would continue to sit for the national anthem when the Seahawks' regular season begins.

After Lane sat during the anthem in a Seahawks' preseason game, he said Kaepernick reached out to thank him for his support and his gesture.

Megan Rapinoe, one of America's most prominent soccer players, knelt during a National Women's Soccer League match recently in support of Kaepernick. Rapinoe said she was disgusted by how Kaepernick has been treated, and would continue to kneel throughout the season.

"Quite honestly, being gay, I have stood with my hand over my heart during the national anthem and felt like I haven't had my liberties protected, so I can absolutely sympathize with that feeling," she said.

Tim Kaine, the Democratic vice-presidential nominee, said that Kaepernick's rationale "didn't really make that much sense to me," but supported his right to protest.

"You've got to respect people's ability to act according to their conscience, so I wouldn't presume to tell him what to do," he said.

Discussion Questions

1. Describe the "free speech" provision of the First Amendment to the United States Constitution.

According to the particular language of the First Amendment to the United States Constitution:

"Congress shall make no law...abridging the freedom of speech..."



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It is important to note that even though the controversy surrounding Colin Kaepernick is frequently described as a “free speech” case, there has been no attempt by government to restrict his freedom of speech/expression. Additionally, so far, there has been no attempt by his employer (the San Francisco 49ers football club) to restrict his freedom of speech/expression.

2. In your reasoned opinion, do Colin Kaepernick’s actions represent constitutionally-protected free speech? Why or why not?

This is an opinion question, so student responses may vary. As mentioned in response to Ethical Dilemma Discussion Question 1 above, there is no question of deprivation of constitutionally-protected free speech in this case, since there has been no attempt by government to restrict his freedom of speech/expression. Additionally, so far, there has been no attempt by his employer (the San Francisco 49ers football club) to restrict his freedom of speech/expression.

It is interesting to note that President Barack Obama has gone on record in support of Kaepernick’s freedom of expression, but has warned athletes that staging such protests (kneeling during the playing of the national anthem) could be offensive to those who have served in the military or their families.

3. Suppose that the San Francisco 49ers football club (Kaepernick’s employer) experiences a decline in revenue due to Kaepernick’s actions. Based on such a decline in revenue, would 49ers ownership have the right to require Kaepernick to either stand during the national anthem or face disciplinary action? Why or why not?

Historically, courts have been less likely to protect speech in the workplace than speech in a “public forum.” This means that employers have great leeway to impose reasonable time, place and manner restrictions on employee expression, particularly if such expression is disruptive of the work environment and employee productivity. Technically, the San Francisco 49ers football club could take disciplinary action against Kaepernick under such circumstances, but the club may be reluctant to do so for fear that such a decision might actually have a negative effect on its revenue stream (due to a negative reaction from fans who support Kaepernick).



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Of Special Interest

This section of the newsletter will assist you in addressing Article 1 ("Fox Will Pay Gretchen Carlson \$20 Million to Settle Sexual Harassment Suit") and Article 2 ("Woman Uses Indiana Religious Objections Law in Defense against Child Abuse Charges") of the newsletter.

Teaching Tips

Teaching Tip 1 (Related to Article 1—"Fox Will Pay Gretchen Carlson \$20 Million to Settle Sexual Harassment Suit"):

"Facts about Sexual Harassment"

<https://www.eeoc.gov/eeoc/publications/fs-sex.cfm>

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.



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When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

Teaching Tip 2 (Related to Article 2--“Woman Uses Indiana Religious Objections Law in Defense against Child Abuse Charges”):

Indiana’s “Religious Freedom” Law

<http://www.indystar.com/story/news/politics/2015/03/27/text-indianas-religious-freedom-law/70539772/>

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. IC34-13-9 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2015]:

Chapter 9. Religious Freedom Restoration

Sec. 1. This chapter applies to all governmental entity statutes, ordinances, resolutions, executive or administrative orders, regulations, customs, and usages, including the implementation or application thereof, regardless of whether they were enacted, adopted, or initiated before, on, or after July 1, 2015.

Sec. 2. A governmental entity statute, ordinance, resolution, executive or administrative order, regulation, custom, or usage may not be construed to be exempt from the application of this chapter unless a state statute expressly exempts the statute, ordinance, resolution, executive or administrative order, regulation, custom, or usage from the application of this chapter by citation to this chapter.

Sec. 3. (a) The following definitions apply throughout this section: (1) "Establishment Clause" refers to the part of the First Amendment of the Constitution of the United States or the Constitution of the



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State of Indiana prohibiting laws respecting the establishment of religion. (2) "Granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions. (b) This chapter may not be construed to affect, interpret, or in any way address the Establishment Clause. (c) Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, does not constitute a violation of this chapter.

Sec. 4. As used in this chapter, "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

Sec. 5. As used in this chapter, "exercise of religion" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

Sec. 6. As used in this chapter, "governmental entity" includes the whole or any part of a branch, department, agency, instrumentality, official, or other individual or entity acting under color of law of any of the following: (1) State government. (2) A political subdivision (as defined in IC 36-1-2-13). (3) An instrumentality of a governmental entity described in subdivision (1) or (2), including a state educational institution, a body politic, a body corporate and politic, or any other similar entity established by law.

Sec. 7. As used in this chapter, "person" includes the following: (1) An individual. (2) An organization, a religious society, a church, a body of communicants, or a group organized and operated primarily for religious purposes. (3) A partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity that: (A) may sue and be sued; and (B) exercises practices that are compelled or limited by a system of religious belief held by: (i) an individual; or (ii) the individuals; who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes.

Sec. 8. (a) Except as provided in subsection (b), a governmental entity may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability. (b) A governmental entity may substantially burden a person's exercise of religion only if the governmental entity demonstrates that application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

Sec. 9. A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding. If the relevant governmental entity is not a party to the proceeding, the governmental entity has an unconditional right to intervene in order to respond to the person's invocation of this chapter.



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Sec. 10. (a) If a court or other tribunal in which a violation of this chapter is asserted in conformity with section 9 of this chapter determines that: (1) the person's exercise of religion has been substantially burdened, or is likely to be substantially burdened; and (2) the governmental entity imposing the burden has not demonstrated that application of the burden to the person: (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest; the court or other tribunal shall allow a defense against any party and shall grant appropriate relief against the governmental entity. (b) Relief against the governmental entity may include any of the following: (1) Declaratory relief or an injunction or mandate that prevents, restrains, corrects, or abates the violation of this chapter. (2) Compensatory damages. (c) In the appropriate case, the court or other tribunal also may award all or part of the costs of litigation, including reasonable attorney's fees, to a person that prevails against the governmental entity under this chapter.

Sec. 11. This chapter is not intended to, and shall not be construed or interpreted to, create a claim or private cause of action against any private employer by any applicant, employee, or former employee.



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Chapter Key for McGraw-Hill/Irwin Business Law Texts:

	Hot Topics	Video Suggestions	Ethical Dilemma	Teaching Tips
Barnes et al., Law for Business	Chapters 1, 2, 4, 5 and 25	Chapters 1, 2 and 4	Chapters 4 and 25	Chapters 4, 5 and 25
Bennett-Alexander & Hartman, Employment Law for Business	Chapter 9	N/A	Chapter 2	Chapter 9
Kubasek et al., Dynamic Business Law	Chapters 1,3, 5, 7 and 43	Chapters 1, 3 and 5	Chapters 5 and 43	Chapters 5, 7 and 43
Kubasek et al., Dynamic Business Law: Summarized Cases	Chapters 1, 3, 5, 7 and 43	Chapters 1, 3 and 5	Chapters 5 and 43	Chapters 5, 7 and 43
Kubasek et al., Dynamic Business Law: The Essentials	Chapters 1, 3, 8 and 11	Chapters 1 and 3	Chapters 1 and 11	Chapters 1, 8 and 11
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment	Chapters 1, 2, 3, 5 and 51	Chapters 1, 2 and 3	Chapters 3 and 51	Chapters 3, 5 and 51
McAdams et al., Law, Business & Society	Chapters 4, 5 and 13	Chapters 4 and 5	Chapters 5 and 12	Chapters 4, 5 and 13
Melvin, The Legal Environment of Business: A Managerial Approach	Chapters 2, 3, 13 and 23	Chapters 2 and 3	Chapters 2 and 12	Chapters 2, 13 and 23
Pagnattaro et al., The Legal and Regulatory Environment of Business	Chapters 3, 6, 13 and 20	Chapters 3 and 6	Chapters 6 and 21	Chapters 6, 13 and 20
Sukys, Brown, Business Law with UCC Applications	Chapters 2, 3, 5 and 23	Chapters 2 and 3	Chapters 2 and 23	Chapters 2, 5 and 23



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This Newsletter Supports the Following Business Law Texts:

- Barnes et al., Law for Business, 12th Edition 2015© (0078023815) – New edition coming January 2017
- Bennett-Alexander et al., Employment Law for Business, 8th Edition 2015© (0078023793)
- Kubasek et al., Dynamic Business Law, 3rd Edition 2015© (0078023785) – New edition coming January 2017
- Kubasek et al., Dynamic Business Law: Summarized Cases, 1st Edition 2013© (0078023777)
- Kubasek et al., Dynamic Business Law: The Essentials, 3rd Edition 2016© (007802384X)
- Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 16th Edition 2016© (0077733711)
- McAdams et al., Law, Business & Society, 11th Edition 2015© (0078023866)
- Melvin, The Legal Environment of Business: A Managerial Approach, 2nd edition 2015© (0078023807) – New edition coming January 2017
- Pagnattaro et al., The Legal and Regulatory Environment of Business, 17th Edition 2016© (0078023858)
- Sukys, Brown, Business Law with UCC Applications 14th Edition 2017© (0077733738)

